The
American Economic Review

VOL. V JUNE, 1915 No. 2

THE FIELD OF WORKMEN'S COMPENSATION IN THE UNITED STATES

SUMMARY. Workmen's compensation established, tardily, in the United States, 221; Renewed movements for uniformity of laws, 223; Adequacy more important than uniformity, 225; Scope more important than awards or procedure, 227; Field of compensation, 229; Inclusion of employers, 231; Exclusion of highly paid employees, 232; Meaning of employment, 233; Manual and mechanical labor, 235; Numerical exceptions, 236; Public employments, 238; Outworkers, 240; Casual labor, 242; Employment not for gain, 244; General employments covered, 247; Connecticut, New Jersey, Ohio, and Wisconsin exclude none, 248; General exception of domestic and farm labor, 249; Occupational hazard as criterion, 251; Constitutional problems of hazard, 252; Enumeration lists, 255; Arizona, 257; Illinois, 258; Kansas, 258; Louisiana, 259; Nevada, 260; New Hampshire, 260; Washington, 261; Oregon, 262; West Virginia and Kentucky, 262; New York, 263; Maryland, 267; Comparative hazards, 267; Numbers in different employments, 270; Estimates for states and groups of states, 272; Administrative difficulties, 277; Conclusion, 278.

It is quite safe now to say that the principle or policy of workmen's compensation is established firmly in the United States. Our acceptance of the system was, indeed, tardy, and that for reasons not far to seek in our form of government, in general social and industrial conditions, and in the temper of the people. And so it came about that there were between thirty and forty foreign states with compensation laws when we had none.[1] But within a brief period there has been a great change. Just four years ago, March 14, 1911, the oldest of the American compensation statutes were approved, in two states on the same day, in

[1] The United States Bureau of Labor Statistics shows thirty-seven in Bulletin No. 126; but the laws of Bulgaria and Montenegro probably ought not to be recognized as compensation laws. Even without these, however, the number includes every great nation of Europe and nearly all of the smaller ones; it includes most of the provinces and larger colonies of the British Empire; and it includes three states in Spanish America. It includes all of the European nations, the small as well as the great, which are counted as most advanced or progressive, and with these Russia, Spain, Italy, Hungary, Greece, Norway, Finland, little Serbia and tiny Liechtenstein; it includes Alberta, Manitoba, Quebec, and Newfoundland, Peru, Venezuela, and Nuevo Leon.

Washington and in Kansas.[2] Now there are twenty-three states with compensation acts in full force. It is true that the unexpected annulment of the Kentucky statute before it could take effect[3] keeps us still without compensation systems in more than half of the states, and it is true that states as important in an industrial way as Pennsylvania and Missouri are among those which have not yet enacted. But it is true also that the twenty-three states which already have compensation laws in operation have more than half of the population of continental United States and that they include much more than half of the industrial activity of the country.[4] And the end is neither here nor near. In present legislative sessions compensation acts have been passed in Indiana and Oklahoma. Bills are pending in Delaware, Maine, Missouri, Montana, Pennsylvania, Vermont, and Wyoming, and perhaps in other states; and in still others workmen's compensation is a public issue of more or less importance.[5] The recommendations of governors and of specially constituted commissions

[2] The first of the American laws to take effect was that of Wisconsin (c. 50 of 1911), approved May 3 and at once effective as to its compensation provisions. The earlier acts of Maryland (c. 139 of 1902), Montana (c. 67 of 1909), and New York (c. 674 of 1910) are well known; but these were all declared unconstitutional by the courts. The subsequent accident insurance law of Maryland (c. 153 of 1910) and the purely voluntary compensation law of New York (c. 352 of 1910) need not be recognized here. The several federal statutes, culminating in that now in force (c. 236 of 1907-8), approved May 30 and in effect August 1, 1908, were also earlier; but these are not so much proper compensation laws, granting new rights to compensations in lieu of former rights of action against employers, as declarations of governmental policy or gifts of sovereign grace.

[3] C. 73 of 1914, to take effect January 1, 1915, declared unconstitutional, as in reality a compulsory act, by the Court of Appeals, December 11, 1914, in the case of *Kentucky State Journal Co.* v. *Workmen's Compensation Board,* 161 Ky. 562; 170 S. W. 1166; petition for rehearing overruled January 27, 1915, 172 S. W. 674.

[4] Arizona, California, Connecticut, Illinois, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oregon, Rhode Island, Texas, Washington, West Virginia, and Wisconsin had in 1910 about 57 per cent of the population, 52,386,484 as against 39,788,031 in the other states; and they had 64.4 per cent of the persons of 10 years and over engaged in transportation, 66.5 per cent of those engaged in trade, and 66.7 per cent of those in manufacturing and mechanical pursuits.

[5] Colorado, Idaho, Kentucky, Mississippi, North Dakota, South Carolina, Tennessee. The South Carolina House has rejected a bill this session.

of inquiry, the demands of organized laborers and of employers, and the advice of qualified experts in social policy all combine to make clear enough the course of the future. And the compensation system is never abandoned, once it has been adopted. It is developed, but it is never rejected.

In such a situation, with such an outlook, and after four years of American experience, a new period has opened, in which the endeavor is not for a compensation law but for the best. At first, when the agitation in this country was becoming definite, active, and strong, and when the earliest American bills were being framed and passed, about 1909[6] and the years following, nobody here felt entirely sure of his ground. Nobody doubted that industrial accidents in the United States were a great, although an unmeasured evil; and few denied that the experience of Europe gave us a warrant for attempting to set up in this country some sort of compensation system. But there was little strong conviction in individual minds, and there was nothing like general agreement as to which of the European models might be copied here most closely and most wisely. The prevalence of different forms of industry in different regions and in different states had made the problem of industrial accidents more urgent in one place than in another. So, too, had differences of temper and of condition among those engaged in industry. Even constitutions and constitutional limitations were not identical everywhere. And these diverse elements of a complex situation were estimated variously here and there, both in the vaguely formed public opinion and in the deliberate judgments of experts. There was a real desire for uniformity of action from the first,[7] but it could

[6] This was the year of the earliest special state commissions of inquiry, in Minnesota, Wisconsin, and New York, and of the Atlantic City conference on workmen's compensation. Some years earlier, in 1903-4, Massachusetts had a committee on relations between employer and employee, which discussed workmen's compensation in quite the modern spirit, although briefly and as but one of a dozen subjects within a single short report, and which submitted to the legislature a compensation bill adapted from the then valid British statute of 1897. Illinois had a similar committee a year later; and there may have been others. But these were not specifically for the subject of workmen's compensation.

[7] A desire for harmony of action was the chief motive for the several conferences of state commissioners and other interested persons in 1909 and 1910: Atlantic City, July 29-31, 1909; Washington, Jan. 20, 1910; Chicago, June 10-11, 1910; Chicago, Nov. 10-12, 1910. See, in particular, the report of the

not prevail. There was no record of experience under American conditions to which an appeal might be made for guidance and for the persuasion of legislators. It was recognized that bills must be adapted not only to what might be judged desirable for workmen, for employers, and for the others whose interests were involved, but also to various class and local influences and prejudices, and, quite as carefully as to anything else, to what had been or might now be pronounced constitutionally permissible under our form of government.[8]

The results are all too well known to those who have attempted to follow the course of American compensation legislation. No two statutes are alike: it might perhaps be correct to say that no two are closely similar. Some important likenesses there are between acts and even throughout small groups of acts; and certain provisions appear with but the slightest variations in several states. A number of provisions have become, as it were, standardized. But in assembling their statutes the several states use few or more of these standard parts, according to their respective fancies, and combine them with more or fewer other parts which are of local origin.[9] The resultant products are as like as the first twenty-three carriages to turn a given corner in the morning. While

later Chicago conference, p. 317, and the report of the Wisconsin state commission, p. 38.

[8] Even the latest of the serious American literature of workmen's compensation takes account of questions of constitutionality, as the *Uniform Workmen's Compensation Act,* p. 5, approved by the Conference of Commissioners on Uniform State Laws, October, 1914. But such questions are by no means as prominent—or as disturbing—now as they were five or six years ago. Full half of the printed report of the Atlantic City conference of July, 1909 (pp. 54-216), was devoted to a paper by Mr. H. V. Mercer of the Minnesota commission on "Legal possibility of workmen's compensation acts." And some of the best guides for the present study of the constitutional question are in the reports of that period, especially in the report of the Chicago conference of November, 1910, pp. 31, 233, 307, 340. See also the state reports as follows: New York, part 1, pp. 46, 182, 262; Minnesota, pp. 163, 213; Washington, p. 27; Ohio, p. lxxix; Illinois, pp. 51, 81.

[9] The closest general likeness is between West Virginia and Kentucky. The field of application is almost identical in New York and in Maryland. The general form of the Washington statute has been adopted somewhat fully by Oregon and Nevada, with the very important difference that with them the system becomes optional instead of compulsory as in Washington. The detailed schedule of somewhat definite awards for specific maimings which New Jersey adopted in 1911 has been taken over by many states, either with minor changes or with none at all.

such a situation has done little for the comfort or better temper of those who study the statutes, it has had a compensatory consequence, in that it has meant a greater variety of American experience than could have been had otherwise. There are not many devices of compensation policy known in the world and quite untried in this country. Naturally, therefore, the movements for uniformity of legislation show renewed strength. The National Civic Federation, long an advocate of uniform laws, has issued, through a special committee on uniform legislation upon workmen's compensation, a new proposal in the form of a "memorandum of suggestions upon main provisions requisite to an adequate" law.[10] The American Association for Labor Legislation has adopted and published a set of "standards for workmen's compensation laws," covering the more important necessary elements of a statute,[11] and has embodied them in a model bill. And the Conference of Commissioners on Uniform State Laws has approved, issued, and recommended to all the states a revised and complete draft of a bill.[12]

It is far from the purpose of this study to discuss broadly the problems of uniformity in compensation legislation. To attempt that in the pages of the AMERICAN ECONOMIC REVIEW would be to raise, at the least, some scores of questions and to examine none of them satisfactorily. Many interesting and important questions, both small and great, must be ignored in order to concentrate attention upon one alone. And that one is to be considered, not as a question of uniformity but as a question of adequacy. Nor is the distinction of merely formal or slight significance. The National Civic Federation does well to mark its memorandum as suggestions for an adequate law. Doubtless the conditions of one sort and another, constitutional, industrial, and social, in the several American states are nearly enough alike to bring adequate laws into something like uniformity; but, wherever the demands of adequacy, of balanced justice for all, may clash with the demands of uniformity, it is uniformity that must give way. It has been said commonly that there are three broad essentials of a compensation law. Payments must be allowed for the general run of injuries regardless of personal fault; the sums to be paid must be fixed in the statute, at least with some degree of definiteness;

[10] January, 1915.

[11] September, 1914.

[12] October, 1914.

and the whole system must be simple, prompt, and inexpensive in administration. Comprehensiveness of scope, definiteness of awards, and simplicity of administration are the three essentials. And it is quite beyond doubt that the need for uniformity, real uniformity, among the American states has been magnified in each particular. If uniformity, strict or approximate, can be had without the sacrifice of what is more important, well and good. But uniformity is not the supreme excellence. There may be a uniformity in badness. It was not the lack of uniformity in the liability laws that was the evil of former days. The only uniformity that is worth having in the compensation laws is a uniform adequacy.

If the administration be simple, so that it is prompt and inexpensive and can be understood by the average layman, that is quite enough; and, within limits not very wide, both organization and procedure may be allowed to match with the usages of the different states. The desirability of uniformity of awards throughout the country has been exaggerated beyond all reason. Much more to be desired is it that the awards be just everywhere, a fair balance between adequacy to the needs of the injured and reasonableness for the employer and society. It even may be denied that the uniformity which is urged so often, a uniform percentile rating of awards upon earnings, as it is established within the states and as some seek to establish it among the states, is uniformity in any real and important sense, either for the employee or for the employer.[13] But, in any case, it is obvious that some-

[13] Employers, contractors and others, who do business in several states, would find some slight but real convenience in their bookkeeping and in their estimates if this sort of uniformity were established throughout the states. The convenience for attorneys and insurance companies also is clear. And this same nominal uniformity might tend to minimize the possibilities of temporary disturbances in interstate competition, within any single trade or business. But a uniform rating of awards upon wages tends rather to disturb the evenness of competition among different trades, and so among different states in so far as different trades predominate in different states. It is one thing to mention 50 per cent of wages to an employer whose pay-roll makes 1.6 per cent of all his expenses, as with the producers of distilled liquors in the United States in 1909; it is quite a different thing where wages make 44.8 per cent of all expenses, as in marble and stone work.

Essentially, it is the same on the side of the employee. Evidently such rating of awards upon earnings as we now have in the United States, except in Washington and Oregon, means no uniformity in the amounts paid and received; and, when the ratings and awards are taken with the customary limits

thing like uniformity of scope, uniform adequacy of scope, is more important than any uniformity of awards, more important for the employer, for the employed, and for any who may be affected through these. Within the limits practically to be considered now in the United States, 50 per cent and 66 2/3 per cent, any differences in the awards can make but the slightest difference in the total expenses of the average employer, and so but the slightest difference to society at large, in the costs of products and services, probably not more than a minor fraction of one per cent.[14] But, quite manifestly, it makes at least three or four times as much difference to an employer whether his industry is or is not included within the field of the compensation law.[15] And, while it is far from being a matter of indifference to an injured workman or his widow whether an award runs at $10 a week or at $13.33, still to have at least the $10, rather than nothing, or nothing but a right of action against an employer, is the great advantage. The scope of compensation laws in

of maximum and minimum, it is clear that they do not mean any uniform percentage of earnings. In fact, that which is in the minds of those who plead for uniformity of awards may or may not be worth working for; but it is not uniformity except in a sense that it is formal, superficial, unreal.

It is of interest to note that of the three bodies mentioned in the text as now working for uniform compensation laws the two which might have been presumed to have weighed ecomomic considerations most carefully, the National Civic Federation and the American Association for Labor Legislation, declare for a uniformity of percentile rating of awards upon earnings; whereas the lawyers of the conference on uniform laws, whose slips in economic science might have been condoned, do not declare themselves in the same sense.

[14] The bulletin of the United States census for manufactures in 1909 (p. 31) shows wages as 22.8 per cent of all expenses of Massachusetts manufacturers. The first report of the Massachusetts Industrial Accident Board (p. 26) gives 1.2 per cent of the pay-roll as a minimum estimate of the cost of compensation insurance in that state. And 1.2 per cent of 22.8 per cent is .2736 per cent. Moreover, what the employer pays for compensations or compensation insurance is in substitution for whatever he had paid or would pay under a liability law for insurance, settlements, legal expenses in personal injury cases, and damages. Clearly, he can not be burdened very heavily by the compensation system; nor can the average member of society through him. Still less can anybody be weighed down by the addition of a little more or a little less to the awards.

[15] Evidently it makes as much difference as that. In reality it makes much more, nearly twice as much, since the costs of compensation insurance have been made up nearly as much by expenses of administration as by the awards paid.

America, then, is the important subject for present consideration, adequacy of scope rather than uniformity.

The scope of a compensation law is known when it is known to what injuries the law applies. It is common to mark sharply the contrast between a compensation law and an employers' liability law by saying that the former grants its compensations, its solace, for all industrial injuries without regard to personal fault in anybody.[16] But nobody really means just that. That, possibly, might be true of an ideal compensation law in an industrial world perfect in itself—save for the recurrence of accidents—and peopled with perfect men. But, for a variety of good reasons, no compensation law in this imperfect world has ever undertaken to award payments on account of all the accidents of industry. Injuries are excepted both because of personal responsibilities and for other reasons. And the narrowed scope of the real compensation law is seen in its declaration as to what injuries shall entitle to compensations and what shall not. Now industrial accidents may be distinguished and classified in various ways. Perhaps it may do to say that they may be distinguished as to time, place, and, in general, as to circumstances, as to causes, and as to results. And no compensation law in the United States, or elsewhere, grants its awards quite regardless of the circumstances, causes, and results of the accidents of industry.

Of causes and results no discussion will be attempted here. The inclusion of injuries within the scope of the compensation law has been made to depend upon a number of facts, or questions, which can be suggested best by the phrases now well established in foreign and American usage. Was the injury received in the course of the employment and from causes arising therein? Was it due to accident, as contrasted with a purposed action? Must an accident be understood as some large and open event, a single occurrence which can be located in time and place? or may it be understood to include also small and obscure occurrences, single or in series, which will be known only through their cumulative results? Was the cause, so far as fairly connected with the employment, sole and exclusive, or was it combined with extraneous

[16] So writes President E. S. Lott of the United States Casualty Company in the issue of *Cotton* for January, 1913. "What is meant by workmen's compensation laws? That every workman who sustains an accidental bodily injury in the course of his employment shall receive compensation from his employer."

causes? Was it proximate or only secondary? And, in particular, was the injury due, in any degree or altogether, to a fault of the injured? The result of the accident must be some personal or bodily injury, or there is no human accident to have our present attention. But is the result of the injury any degree of disability to work and earn? Are disabilities from disease or in the form of disease to be recognized? If so, industrial diseases only? or others as well? Of what duration is the disability? Is the result death? If so, within what period after the accident or the injury? Is the result a disfigurement, with or without any necessary inability to work and earn? All of these questions and their answers are of some degree of practical importance, even within the United States; for upon each one of them, in one state or another, it has been made to hang whether or not an accident or an injury entitles to compensation.

If it be permissible to use the phrase "scope of compensation" to indicate the accidents or injuries, however distinguished and classified as to causes and results, for which awards are allowed, there will be a present convenience in adopting the phrase "field of compensation" to indicate the employments or occupations within the limits of which awards are to be paid and received, provided that the causes and the results of accidents match with the requirements of the statute, and outside the limits of which the statute does not afford compensations, no matter what the causes or results of an accident. The field will be broader than the scope by those accidents, within the included employments, whose causes or results are held not to warrant compensation. And it is in this meaning of the phrase that the field of workmen's compensation in the United States is to be studied now. Account will be taken of the twenty-three state laws in force at the date of writing[17] and also of the judicially annulled statute of Kentucky, since this last is quite as instructive as if it had been allowed to stand; but the laws of the United States will not be considered. Nor in the states will any account be taken of such provisions of law as allow some or all of the employers not otherwise brought within the field of compensation to enter by their own unconstrained and voluntary election. Only those employments or occupations will be recognized as within the field for which the compensations are either compulsory, as in California,

[17] March 25, 1915.

New York, Maryland, Ohio, Washington, and perhaps Arizona, or optional, as generally in the other states.[18] In few or none of the states will the field be found to be adequately broad; while the differences in its extent will be found to constitute a lack of uniformity more unfortunate than could be revealed in schedules of awards, in methods of procedure, or in any other elements of the statutes. The references in the notes are to the laws as now in force, as well as to the abortive Kentucky act, by their varied parts, articles, sections, and subsections.[19]

[18] It would conduce to clearness of thought if compensation statutes, and particular provisions within them, might be distinguished as compulsory, optional, and voluntary. Compensation is compulsory when it is required unconditionally by the state; although the provisions for enforcement may vary. Where, as in most of the American states, it is sought to make the employer elect the system through his fear of losing some of his old defences in actions for personal damages or through any other constraint, the compensation sometimes is called optional and sometimes elective. But a distinctive term is needed for the cases in which the compensation system is not compulsory and is not pressed upon the employer by any threat of making his position less eligible than before, but is offered for his wholly unconstrained acceptance. If this last sort of compensation might be called voluntary—and it is voluntary—then the term "optional" would be left for the commonest type of American statute. The voluntary type is illustrated by the still valid but now forgotten chapter 352 of the New York acts of 1910 and the equally insignificant chapter 837 of the Maryland acts of 1912. Voluntary compensation is offered now to employers outside the field of compensation, as defined in the text, by special provisions scarcely noted here and there in the texts of many of the present statutes: Arizona, 79; California, 87, a; Illinois, 1; Iowa, 22; Kansas, 8; Kentucky, 15, 59; Louisiana, 1, 4; Maryland, 33; Massachusetts, IV, 6; Michigan, VI, 4; Nebraska, 6, 3; New York, 114; Ohio, 71, 98; Oregon, 31; Rhode Island, I, 3; Washington, 18, 19; West Virginia, 18, 52; Wisconsin, 1, 8.

[19] There are many questions of interpretation about which nobody can be confident prior to judicial determinations. The Arizona statute as a whole is a case in illustration. The statute declares itself a "workmen's compulsory compensation law as provided in section 8 of article xviii of the state constitution" (65). But the high legal authority of the Commission on Uniform State Laws will not recognize it as such, apparently counting it as optional. The difficulty is in the uncertain bearings of section 78; but, as employers and employees who take advantage of the law's permission to "disaffirm" its provisions, or who refuse to be bound by it, stand before the courts exactly as in the past, I should count the law either compulsory or voluntary.

Without attempting often to justify my own interpretations I have chosen such as have appeared to me to be in best accord with the good usage of words and with those court decisions which are already available. I shall be glad to be informed of any errors of judgment and to be corrected in errors of whatever nature.

In the compensation laws of the American states, as in the laws of foreign states, employments or occupations have been marked for exclusion or for inclusion in many ways and by many tokens. Sometimes they are designated in terms of trade, business, or industry, most commonly so, as mining or coal mining, agriculture, tanning, the manufacture of bricks, gloves, furniture, or gunpowder. Sometimes they are designated in terms of agency, or process, or instrumentality, as the use of machinery or power-driven machinery, or steam engines, or molten metals, compressed air, explosives, or electrical currents. Again, they are designated by location, environment, or circumstances, as in mines, underground, or under water, near inflammable fluids or gases, near explosives or steam engines, or above certain elevations. The inclusion or exclusion has been made to depend upon conditions which, in a free use of words, may be called personal or subjective. Is the employment for the employer's profit, in the course of his trade or profession? Is the employer a public authority? or a private person, natural or legal? Is the employment in the way of mechanical or manual labor, or in what are distinguished as clerical or non-operative tasks? How many are there in a common employment, or in the service of a common employer? Is the labor regular or only casual? Is the employee an "outworker"? Who shall be recognized as employees? Shall apprentices? minors? aliens? Shall employees of the highest rank and highest earnings be included? Shall self-employment be recognized? Because the American states have faced and answered these conditions and questions in very different ways their fields of compensation vary much in their degrees of inadequacy.

Only two, or in another reading of relations, three of the states allow employers to share with employees in the benefits of compensation. Everybody who has had practical experience with compensation laws must have heard employers complain, sometimes quite earnestly and sometimes only half seriously, that they also are exposed to danger in their work and have no compensation systems to protect them. A strange suggestion it appears at first that an employer might desire to share in a protection which he himself extends, under constraint of law, to his employees; and the natural quick response is that any employer is quite free to cover his individual hazards, whether the same as those of his workmen or different, by the simple and long familiar device of

the accident insurance policy. But, when some method of assuring the employee's awards and insuring the employer's liabilities is made a part of the compensation system, so that it is no longer simply a matter of the employer himself making payments directly from his own funds on account of injuries received in his service, there is no obvious reason, if there is any at all, why, within limits at least, employers may not enjoy the protection of compensation laws together with employees, even with their own employees.

Such an arrangement long has been known in Europe;[20] and it was provided by Washington in one of the earliest of the American statutes. Since then it has been adopted by California and, in a certain sense, by Oregon. On the other hand, West Virginia and her close imitator, Kentucky, have gone so far in the opposite direction as to declare expressly against allowing a "member of a firm of employers or any officer of a corporation employer" to share in the benefits of compensation, as a workman.[21] Space here will not permit an examination of the conditions under which this policy has been developed in Europe and North America. Suffice it to note the obvious fact that it must be in connection with the insurance of the compensation awards and further that it is found on this side of the ocean only where there is a state fund of insurance, that it tends to be limited to employers who share to a degree the financial and physical circumstances of their employees, and that commonly there is a stipulation as to the figures at which the self-paid salary may be rated for the insurance premiums. Perhaps American compensation laws might be made better, as well as more welcome with certain classes of indifferent or hostile employers, by the wider adoption of this simple arrangement.

The limitation of the act to employees earning less than a fixed sum a week or a year, which is not at all unusual in foreign compensation laws, is very rare indeed in this country. A limitation

[20] Austria, 1894, arts. 5 and 6; Germany, 1900, art. 5; Russia, 1903, art. 51; Hungary, 1907, art. 8; Germany, 1911, arts. 548, 550, 925, and 927. There is a similar provision in the Ontario statute of 1914 (4 Geo. V. c. 25), sec. 12.

[21] Washington, c. 74 of 1911, sec. 3; California, c. 176 of 1913, sec. 42; Oregon, c. 112 of 1913, sec. 14; West Virginia, c. 10 of 1913, sec. 9; Kentucky, c. 73 of 1914, sec. 14. The Oregon act runs as follows: "Any member or officer of any corporate employer who shall be carried upon the pay-rolls at a salary or wage not less than the average salary or wage of such pay-roll, but not otherwise, shall be deemed to be a workman."

of the amounts at which earnings may be taken for the computation of the awards is found,[22] but that is only an alternative method of limiting the amounts of the awards, and it is quite different from denying any award whatever to the more highly paid employees. The total and direct exclusion is found at $1,800 a year in Rhode Island and at $2,000 a year in Maryland. New Jersey excludes public employees at $1,200; and West Virginia accomplishes some small and uncertain part of the same general results by denying the benefits of her act to "managers, superintendents and assistant managers and assistant superintendents."[23]

One's judgment as to the propriety of such exclusions will depend in part, but not wholly, upon his view of the essential nature or character of workmen's compensation. Those who look upon the compensation awards as but a part of the just return for services rendered will be little inclined to approve any distinctions between employees on the basis of earnings. Those, on the other hand, who are not concerned particularly about the place of the awards in economic or legal theory but are content to look upon them as a practical means of saving people from distress, will be disposed to favor the exception of employees whose comfortable incomes give some power of providing in advance for the coming of misfortune. In America we are fond of saying that we take the first view of compensations; and that, very likely, is the reason why but two of the states deny all payments to those in receipt of the high incomes. But, as a matter of fact, the uniform American practice of limiting to moderate amounts the sums to be paid implies something very like the second view. However, the difference of policy, as now found, is not of vast importance. Not many are employed at more than $1,800 or $2,000 a year; few of these will be disabled by injuries; fewer still will be those whose consequent hardships need cause us anxiety.

The meaning of employment, the nature of the contractual or legal relations which must be found in order that compensations may follow disabilities, is not often stated explicitly in the acts. Rather, it is the wise policy to assume the existing general law of master and servant, thus holding as employees for the purposes of the compensations those who are or may be held as such for

[22] California, 15, c; 17, a. Wisconsin, 10. New York, 16—death indemnities only.

[23] Rhode Island, V, 1, b; Maryland, 62, 3; New Jersey, c. 145 of 1913, sec. 1; West Virginia, 9.

other purposes. New Jersey alone makes this assumption explicit, declaring employer "to be synonymous with master." But most of the other states imply quite as much either by the very brevity of their references to a "contract of hire," to a "contract of service," or being "in the service of" one, or by their failure to refer to the matter in any manner whatever. Only Oregon presents a formal and substantial definition. "The term 'employer' used in this act shall be taken to mean any person, firm or corporation, but not including municipal corporations, that shall contract for and secure the right to direct and control the services of any person, and the term 'workman' shall be taken to mean any person, male or female, who shall engage to furnish his or her services subject to the direction or control of an employer."[24]

For much the greater part the definitions of the statutes do more to show the denotations or extension of the terms than to make clear the connotations. It will be declared that the contract may be express or implied, oral or written, or that certain particular classes are to be included, as to the status or rights of whom, it would appear, some doubt might be anticipated, as minors, apprentices, or aliens.[25] The only point at which the definitions touch deeply the relations of employment is in quite a different connection, in the determination of the relations of principals, contractors, and sub-contractors, and their respective rights and liabilities. Here, too, the tendency is to make no innovations in law and to recognize any independent contractor

[24] New Jersey, 23; Oregon, 14. The other states, except perhaps Connecticut and Minnesota, can scarcely be said to face at all the defining of the relations involved in employment. The definition of employee in the California statute is fairly typical of the so-called definitions: "every person in the service of an employer as defined in section thirteen hereof under any appointment or contract of hire or apprenticeship, express or implied, written or oral, including aliens and also including minors. . . ." The definition of employer is no deeper.

[25] Apprentices are mentioned expressly in the definitions of employee in California, 14; Connecticut, B, 43; Iowa, 17, b; Kansas, 9, i; and Rhode Island, V, 1. Similarly, minors are included in California; and minors lawfully employed in Illinois, 5; Michigan, I, 7; Minnesota, 34, g, 2; Nebraska, 15, 2; Ohio, 61; and Wisconsin, 7, 2. Aliens are mentioned in this same definition in California, Illinois, Michigan, Minnesota, Nebraska, and Ohio. New York has a formal declaration that non-resident aliens shall enjoy the benefits of her act (17). This, however, is an apparent provision to safeguard non-resident dependents of aliens fatally injured in the state, and, as such, it has to do with the awards for injuries and not with the bounds of the field of compensation.

as the true employer of his workmen. But, as this is not at all a question of the broader or narrower field of compensation but rather a question of locating the responsible employer within the field, whatever its bounds, these difficult relations call for no discussion here.

The distinction between manual or mechanical laborers and others, of which use is made, one way and another, in many foreign laws, is found but rarely in the United States. The constitution of Arizona authorized and commanded a compensation law only for "workmen engaged in manual or mechanical labor"; and it is probable that the statute should be interpreted as thus limited, although all of the sections which bear directly upon the subject are without limitation.[26] New Hampshire is the only other state which makes just such a distinction general; although Iowa secures nearly the same result by excluding from the benefits of compensation "clerical" employees not subjected to the hazards of the business.[27] In public employment in Massachusetts only "laborers, workmen and mechanics" are covered by the law.[28] In effect and to an important extent, although to an extent not easily ascertained except by actual counting in the different establishments, a similar distinction is made wherever inclusion within the field of compensation is made to depend upon proximity to certain agencies of production, as machinery or explosives.

An examination of the foreign statutes reveals the fact that this distinction had its origin in one or both of two assumptions. The manual or mechanical laborer may be presumed to be more exposed than others to the physical hazards of employment and to have not the highest of incomes. As the American states repudiate generally any direct and explicit distinction of earnings, it is, in so far, but natural that they also should refuse to distinguish manual laborers from others. But where the states have adopted the unfortunate European policy of professing to distinguish dangerous employments and of restricting the compensation system to them, it would be but consistent to distinguish likewise between the more and the less dangerous occupations or tasks within a given industry. There is a striking inconsistency in extending the compensation system over the bookkeeper, the scrubber, the varnisher, and the upholsterer working for a railway

[26] Constitution, art. xviii, sec. 8; statute, secs. 67-72, 78.

[27] New Hampshire, 1, b; Iowa, 17, b.

[28] C. 807 of 1913, sec. 1.

company and not covering the bookkeeper, scrubber, varnisher, and upholsterer doing the same work for a hotel or department store. There would be certain practical difficulties in making satisfactory separations within the industries; and it is for that reason, probably, that the highest courts have sanctioned similar inconsistencies.[29] But the practical difficulties are no less in making sound distinctions between or among industries. It would be well if all attempts at these distinctions might be abandoned.

As in some foreign lands, so in the United States the inclusion or exclusion of an occupation sometimes is made to depend upon the numbers in a common employment or in the service of a common employer. Ten of the states make some use of a criterion of numbers. One method is to accept the distinction of five or more, which Belgium and Luxemburg had chosen for industrial establishments, and apply it in all employments,[30] or with the single exception of mines,[31] or only in factories and other places where power-driven machinery is used.[32] Three states apply generally a figure one higher;[33] one distinguishes at four or more,[34] and one at two or more, a figure so low as to have only a formal significance.[35]

The plausible reason for the numerical distinction is, primarily, a judgment that the hazards of employment are less in a petty establishment; and upon this ground the Supreme Court of the United States recently has approved the distinction at five or more which is found in the Ohio statute.[36] Doubtless the dangers of accident are less in a small establishment than in a large one in the same branch of industry. Where there are no huge machines and remote sources of gigantic power and where the fellow employees are very few, the possibilities of accidents are less and the employee is in a better position to protect himself against any that may occur. If, therefore, differences of occupational hazards make good ground for excluding or including employ-

[29] *Tullis* v. *Lake Erie and Western Railway Co.*, 175 U. S. 348; *Callahan* v. *St. Louis Merchants' Bridge Terminal Railway Co.*, 194 U. S. 628.

[30] Connecticut, A, 2; Nebraska, 6, 1; Ohio, 60, 2. In Nebraska and Ohio there is no numerical exception in public employments.

[31] Kansas, 8.

[32] New Hampshire, 1, b.

[33] Kentucky, 14; Rhode Island, I, 3; Texas, I, 2.

[34] Wisconsin, 1, (2).

[35] Nevada, 1, a; except in public employments.

[36] *Jeffrey Manufacturing Co.* v. *Blagg*, Jan. 5, 1915, 235 U. S. 571.

ments, the distinction of numbers is a proper one: nay, it is a necessary one. It is the more surprising, then, that only four of the ten states which make a numerical distinction attempt in any way to apply the criterion of hazards as among industries[37] and that, of the twelve states which, one way or another,[38] differentiate certain industries as dangerous or hazardous, only the same four make even a partial application of the distinction of numbers. For, if the underlying question whether differences of occupational hazards justify differences of position in a compensation act be waived for now, at least it is clear that hazard is not a function of one variable. It depends in part upon a common employment,[39] but it depends also upon a number of other conditions, in the nature, place, and agencies of the work. Such degree of hazard as might require inclusion under the law is not reached at the same size of plant or with the same number of employees in all branches and forms of industry. If, therefore, this criterion of numbers is to be invoked, it ought to be used with careful discrimination among industries and even among establishments or departments within a given broad industry. Russia and Serbia follow here a wiser course than the generality of American states; for they fix their critical number lower for plants with mechanical power than for plants without power. And, by a similar token, New Hampshire and Kansas are a little wiser than their sister commonwealths.

[37] Kansas, Kentucky, Nevada, New Hampshire.

[38] Nevada, West Virginia and Kentucky do not, in express terms, characterize the industries which they bring into their lists as dangerous; but the general correspondence of the lists with those of the other states is suggestive of a similarity of attitude or purpose.

[39] Clearly, it is the common employment, or, more properly still, employment in a place together, and not the service of a common employer, that is significant. Yet only Wisconsin and New Hampshire, and perhaps Nevada also, make their distinctions thus, or in the common employment. In the Wisconsin statute the proper meaning unquestionably is in the words (1, 2). In New Hampshire employment in a common place is indicated (1, b); and that usually will be common employment also. In Nevada inclusion within the act depends upon occupation "in the same general employment" (1, a), which, evidently, may be in one place together or in any number of places. In Connecticut (A, 2), Kansas (8), Kentucky (14), Nebraska (6, 1), and Texas (I, 2) the distinction hangs upon the service of a common employer; and nothing is stipulated as to a common employment or a common place of employment. In Rhode Island (I, 3) and even in Ohio (61, 2) employment "in the same business" brings within the act; and this, of course, does not necessitate employment together.

Another and a very different reason for excepting the small groups of employees, or, in a phrase now more accurately suggestive, the small employer, has had some practical effect, even where it has not been recognized in the open discussions. In the administration of a compensation system, and especially in the administration of an employer's compensation insurance, there are limits of cost or expense below which it is impossible to go; no matter how small the number of employees to be covered. The minimum insurance premium is an important evidence of this principle. Wherever, then, as in most of the American states, some form of employer's insurance is made a part of the system, the small employer anticipates that the costs will be relatively heavier for him than for those employing larger numbers of workmen. This condition, however, has not had a widely decisive influence. Neither in Europe nor in the world at large is there any close connection between the requirement of employer's insurance and the exception of small groups of employees. Sixteen American states require the insurance or guaranty of the employer's liabilities; and of these only six except from the reach of the law employees in specified minimum numbers.[40] So that there are nine or ten of the states which do not find that a requirement of insurance necessitates the exception of any minimum number of employees. And, on the other hand, there are minimum exclusions in three of the eight states which do not require the employer to insure.

In much the larger number of foreign states no important distinction is made between private and public employments. For the most part, the rule is that in a given occupation it makes no difference, for the purposes of the compensations, whether the work is done for a public authority or for a private employer; and some of the employments which are entirely in public service are mentioned expressly for inclusion under the laws. This wise policy has not been adopted everywhere in the United States, partly, as would appear, because of mere inadvertence and partly for other reasons. It is, indeed, true that public employment here is included more often than it is excluded. Fourteen states include it in general terms,[41] one includes all but state employ-

[40] Nevada should not be counted: her exception, one, is so low as to be but nominal.

[41] California, 13; Connecticut, B, 43; Illinois, 4; Iowa, 17, a; Louisiana, 1, 1; Maryland, 34; Massachusetts, c. 807 of 1913, sec. 1; Michigan, I, 5, 1; Nebraska,

ment,[42] and another includes "county and municipal work" only.[43] Where the compensation is compulsory upon private employers it is, except in New York,[44] declared compulsory for public employers also.[45] Seven states which have gone no farther than optional compensation for private employees, have made the payments compulsory in public employment generally;[46] while Massachusetts, declaring the system compulsory for the state, has left it optional, as with private employers, for the minor political units.[47] Several of the states make the not unreasonable exception of officials or elected officials from the public employees entitled to the compensations.[48]

Of the eight states which fail to cover public employments one, New Hampshire, has not a word in her statute which can be construed as referring to them in any way whatsoever, directly or by implication.[49] Five others define the employers who are to be affected by the law in such terms as probably do not include public authorities.[50] New York and Texas exclude public employment

14, 1; Nevada, 1, b; New Jersey, c. 145 of 1913, sec. 1; Ohio, 61; Washington, 17; Wisconsin, 4.

[42] Minnesota, 34, d.

[43] Kansas, 6.

[44] The "Foley amendment" (c. 316 of 1914) brought public authorities within the definition of employer, but it left still unconditionally valid the limitation to employment for the employer's pecuniary gain.

[45] It will be understood that compensations can not be made formally compulsory upon the state itself, which can not be sued or otherwise coerced, but only upon the subordinate public corporations.

[46] Illinois, 4; Iowa, 1, b; Louisiana, 1, 1; Michigan, I, 5, 1; Nevada, 1, b; New Jersey, c. 145 of 1913, sec. 1; Wisconsin, 4.

[47] C. 807 of 1913, sec. 1.

[48] Illinois, 5; Iowa, 17, b; Louisiana, 1, 1; Michigan, I, 7, 1; Minnesota, 34, g, 1; Nebraska, 15, 1; New Jersey, c. 145 of 1913, sec. 1; Ohio, 61, 1; Wisconsin, 7, 1. Massachusetts accomplishes a broader exception by restricting to "laborers, workmen and mechanics" (c. 807 of 1913, sec. 1). The formal exception of officials is scarcely necessary in Illinois and Louisiana, where the compensation system is limited to employments in which officials would not be found often.

[49] In New Hampshire, as in other states, public employments would not be covered except by some clear statement or implication. Perhaps it may be said that in the New Hampshire provisions for the regulation of suits at law against employers who do not elect there is an implied exclusion of the state at least.

[50] As "persons, firms, or corporations." Arizona, 66; Kentucky, 14; Oregon, 14; Rhode Island, V, 1, a; West Virginia, 9. It is significant, however, that Oregon found it advisable to declare expressly that municipal corporations

by limiting compensations to those employed for the employer's trade or business or his pecuniary gain.[51]

The balance of considerations will be found so heavily in favor of providing the compensations for the general body of public employees that the failure to cover them in any place is most unfortunate. There is real value in the dictum that the public ought to be a model employer. And the model employer takes good care of those injured in his service, if he can afford to do so. But a closer reasoning will lead to the same conclusion. The sound economic theory of workmen's compensation is that the employer's outlay for compensations, his compensation insurance premium, perhaps, figures in his cost of production together with his payments for fire insurance, for raw materials, for machinery, and for wages, and thus are but advanced by him, to be recovered from society at large in the selling price of his products. What better or more consistent social policy, then, than for the same society which, in slightly higher prices assumes the burden of compensations in private employments to assume also, in slightly higher taxes, if need be, the burden of compensations in public employment? What sounder policy than for the public authorities, who sell no products or but few, to make these same advances in the way of compensation payments and have their amount returned from the same society at large by the alternative channel of the taxes? Whether such a policy will or will not bring about a reduction of the taxes for public relief is not of prime importance.

The British compensation act of 1906 made special mention of the "outworker," defining him as the one "to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished, or repaired, or adapted for sale, in his own home or on other premises not under the control or management of the person who gave out the materials or articles," and excluding him altogether from the benefits of the law. This distinction had not been made before in the compensation acts of the

should not be included. Kansas defines employer in the same way (9, h); but she includes municipal and county work by a specific provision.

[51] New York, 3, 5; Texas, IV, 1. Similar limitations in other states produce apparent conflicts of meaning. But in the most of these, Kansas, Maryland, Massachusetts, and Nevada, something in the positive, direct, or specific reference to the public employment should control the meaning. In Nebraska, on the other hand, the limitation to employees occupied for the gain or profit of the employer is unconditional and follows the sections which are intended, apparently, to cover public employments (15, 3).

world; nor has it been made generally since, either without or within the United States. Connecticut is the only American state in which the outworker is mentioned by that name and excluded;[52] although the same result is secured in Nebraska without the use of this particular term.[53] In the most of the states, sixteen in fact, outworkers who are employees are covered equally with others, because no reference whatever is made to them, either by their technical designation or by a description of their circumstances. In Iowa, New York, Maryland, and Ohio outworkers are included by the use of express terms which fit sufficiently their situation.[54] In Washington and Oregon the phrases of the law match completely; and the outworker probably is covered.[55] But it must be kept in mind that no outworker can be covered by the compensation laws unless he is an employee, a "servant," and that a good part of those in this country who work on materials and articles under the conditions suggested by the British definition of outworker are the employees, not of the persons for whom in the most substantial sense they are working, but of more or less irresponsible intermediaries. Such is the case in the sweated trades. A requirement of employer's insurance enforced rigidly would safeguard the position of the unhappily sweated employees. But, in the absence of such a requirement, or in view of the difficulties of its full enforcement, provision might be made for looking past the intermediary and up to the principal for the compensations. It will not do permanently to leave many thousands of garment workers, and others in a like position, with but the shadow of a right which is a precious reality for the great body of working people.

The formal exclusion of the outworker from the employees who may enjoy the protection of the compensation system makes the situation worse. It is out of harmony with the essential principle and spirit of the laws. It is bad enough to leave a large class of workers with only a nominal right, which commonly can not be enforced, and thus deprive them of an advantage which is enjoyed generally by other workers in substantially the same situation; but it is worse to deprive them of even the nominal right

[52] Part A, sec. 2.

[53] Sec. 15, 4.

[54] Iowa, 17, e; New York, 3, 4; Maryland, 62, 3; Ohio, 68.

[55] Washington, 3; Oregon, 14. The workshops covered include the places where the employer has either control or access.

and the benefits of its occasional enforcement. The exclusion of any employees because they are outworkers implies a retention of some part of the old doctrine of liability as conditioned upon personal fault. Except in this view, the employer's access, control, or management of the places of work is of no consequence. Conceivably, reasons for the exclusion might be found; but, in any event, it must be recognized as out of harmony with the underlying principle of the compensation system. Happily it is not found often in the United States.

Casual laborers, too, date their first separate treatment in compensation laws from the same British act of 1906,[56] which excludes from the compensations the "person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business." Outside of the United States, even within the British Empire, casual laborers commonly, but not always, enjoy equally with others the protection of the compensation systems. But with us it is very different. There are but four American states which exclude casual laborers by simple, direct, and general terms and let that be the end of it.[57] But there are six others which exclude them quite as directly and fully by the change of a single word in the phrase which they borrow from the British act of 1906,[58] and there are two more which come to the same end by a way scarcely to be distinguished.[59] The British act had excluded from the compensations only those whose employments were both casual and not in the way of the employer's trade or business. The six states just referred to replace the copulative "and" with the disjunctive "or," and thus effect an important change of meaning. California, Minnesota, and Rhode Island retain the British phrase and the British meaning without change.[60] The Kansas law applies only to workmen

[56] Sec. 13. Possibly a provision of Norwegian law that the employment must require at least thirty working days and at least three hundred days' work should be taken as an earlier instance. See *Twenty-fourth Annual Report of the United States Commissioner of Labor*, p. 2676.

[57] Connecticut, A, 2; Iowa, 1, a; Maryland, 62, 3; New Jersey, 23.

[58] Illinois, 5; Michigan, I, 7, 2; Nebraska, 15, 3; Ohio, 61, 2; Texas, IV, 1; Wisconsin, 7, 2. The words vary slightly: the meaning is the same in all, for present interpretation. In Illinois, Michigan, Ohio, and Wisconsin casual laborers in public employment are not excluded.

[59] West Virginia, 9; Kentucky, 14.

[60] California, 14 and 87, b; Minnesota, 8; Rhode Island, V, 1, b. Iowa also retains the British phrase unchanged in her definition of workman (17, b), but excludes the casual laborer in another connection (1, a).

who have been employed "continuously for more than one month at the time of the accident."[61] The eight other states make no reference to casual laborers or casual labor, and thus leave regular and casual labor in the same relation to the law.[62]

In the American discussions of workmen's compensation the casual laborer looms larger than his small numerical importance might appear to warrant. And yet, as long as there are casual laborers, their relations to the compensation system must be definite. One may, indeed, ask why anything needs to be said in a special way about the casual laborer, why he needs to be distinguished in any particular from regular laborers. If, as the world has decided, compensation is good for them, it ought also to be good for him. Pain and disability are the same for him. Stoppage of earnings is the same. And he is not more likely or able than the average of workers to be provided in advance for the misfortune. Certainly, as he sees the situation, there can be no reason for discriminating against him. None deny this. But, it is said, the casual laborers' engagements are but for the day, perhaps but for the hour, with one employer after another. And the employer's inconvenience and expense in attending to a great number of petty engagements or employments make the inclusion of the casual laborer impracticable. To all this and more the first response is that what has been done is not impracticable. And the casual laborer has been covered for years in several of the American states and notably in the United Kingdom.

For the error of supposing that the common American practice of denying compensations to the casual laborer has been borrowed from the United Kingdom is now manifest. In the British act, compensations are allowed to all such as may be occupied in the employer's business, even though but casually, as to all such as are employed regularly for his comfort or pleasure. Two cases will make clear the difference between the American and the British practice. In the British case of Blyth against Sewell it was held that a workman injured while repairing a farmer's roof was entitled to compensation, since his work, casual though it was, was in the way of the employer's trade or business.[63] In the

[61] Sec. 8.

[62] Arizona, Louisiana, Massachusetts, Nevada, New Hampshire, New York, Oregon, Washington.

[63] 2 Butterworth's *Workmen's Compensation Cases*, p. 476.

Massachusetts case of Joseph C. Gaynor, the supreme judicial court held that a caterer's employee fatally injured while preparing to serve a banquet was not covered, since he had been engaged for that occasion only and was a casual employee, even though it was the regular custom of the employer thus to engage his waiters.[64]

How often the distress of Gaynor's widow will be matched in the experience of others will depend upon the judges' interpretations of the term "casual." The British statute gave no definition; and all but one of the American statutes have been framed with like discretion. Even Nebraska's definition gives no more than might have been drawn from the common usage of men or the course of the British decisions: "occasional, coming at certain times without regularity, in distinction from stated or regular."[65] But there is still something to be desired. Must the regularity or irregularity be judged always from the side of the employee, so that work as important as that of the waiter and the longshoreman, and regular work, too, from the employer's side, can be kept casual forever by the simple device of brief contracts? Or, in different relations, what about the tasks of irregular recurrence but of some duration when they do come, as the threshing of the farmer's grain? How long may such work continue before it passes from the casual into the regular? The perplexities which such questions cause and hardships like that of Gaynor's widow would come to an end with the extension of the field of compensation to include casual laborers everywhere.

As has appeared but now, the extension of the compensation system to certain employments sometimes has been made to turn upon their being or not being for gain or profit, in the trade or business of an employer. In the earlier statutes of the world this distinction was not made. It was not needed, since the field of compensation was outlined usually by naming the "industries" or "enterprises" to be covered, and since the employments, as a rule, were such as scarcely would be found outside of business. But Sweden expressly limited her act of 1901 to certain undertakings carried on "as a business."[66] Queensland made this limi-

[64] *Joseph C. Gaynor's case,* Feb. 27, 1914, 217 Mass. 86. Casual laborers were excluded prior to June 25, 1914, when the definition of employee was changed (c. 708 of 1914, sec. 13).

[65] Sec. 15, 3.

[66] Art. 2.

tation somewhat more explicit in an act of December 20, 1905;[67] and a year and a day later the United Kingdom gave the distinction still greater prominence in the world by introducing it into her great statute of 1906 in the connection in which it has been noted already. But neither in Europe nor in the British Empire, nor elsewhere in the world outside of the United States, has the formal distinction had general acceptance.

Another policy has been developed in this country. Of the twenty-four states which have enacted compensation laws, fifteen in direct terms restrict awards to employment in the employer's trade, business, occupation, or profession.[68] Four others accomplish nearly the same results by the Old-World method of restricting their acts generally to specified occupations which can be found but little outside of trade or business.[69] There remain but five states, California, Connecticut, Minnesota, New Jersey, and Rhode Island, in which employment outside of business might appear generally to be covered, except it be casual. But California, Minnesota, and Rhode Island exclude much the larger part of such employment by the specific exclusion of domestic service;[70] and Connecticut does substantially the same, or more, by restricting her law to employers having regularly five or more workmen.[71] Only New Jersey, therefore, is left in conformity with the liberal British policy of allowing compensations to those employed regularly otherwise than for the employer's business or profit.

Notwithstanding the very strong tendency, both of the Old World and of the New, to restrict the field of compensation in the direction just now noted, there is much to be said for a more liberal policy. The world's general judgment of approval upon workmen's compensation is so emphatic[72] that a heavy burden of proof lies upon those who would reject or restrict anywhere the

[67] Sec. 3.

[68] Illinois, 5; Iowa, 17, h; Kansas, 9; Kentucky, 14; Louisiana, 1, 2; Maryland, 62, 4; Massachusetts, c. 708 of 1914, sec. 13; Michigan, I, 7, 2; Nebraska, 15, 3; Nevada, 1, a; New York, 3, 5; Ohio, 61, 2; Texas, IV, 1; West Virginia, 9; Wisconsin, 7, 2.

[69] Arizona, 67; New Hampshire, 1; Oregon, 13; Washington, 2.

[70] California, 14; Minnesota, 8; Rhode Island, I, 2.

[71] A, 2.

[72] "In fact, it may be doubted whether any subject of labor legislation has ever made such progress or gained so general acceptance for its principles throughout the world in so brief a period." *Bulletin of the U. S. Bureau of Labor Statistics,* No. 126, p. 9.

beneficent legislation. The injury and its consequences are equally serious whether the accident is met in working for an employer's profit or for his pleasure. In not a few employments there will be difficulties in determining the end or purpose.[73] It can not be shown that those who employ others for their own convenience and pleasure are less able to advance or to pay and bear the costs of compensations than are those who employ for profit. In so far as the advances can be shifted, the reasons for distinguishing industrial and non-industrial employments tend to disappear. If the non-industrial employer must not only advance but really bear the costs of compensations to his employees, at least these costs will be but trivial except where many servants prove ability to pay.

In any event, it is well to mark plainly that the exception of non-industrial employment means more than is quite evident at first. "Domestic servants" are the most numerous class affected, and they include a considerable number of indoor and outdoor workers—cooks, maids, laundresses, nurses, companions, butlers, valets, tutors, gardeners, and what not. With them, under whatever general designation, stand the secretaries, coachmen, chauffeurs, stablemen, caretakers on estates, hands on private vessels, and so on. Excepted, too, as not employed for profit, are all employees of churches, colleges, some or most libraries, hospitals, museums, some clubs, and the general run of religious and charitable institutions or associations. More serious is the fact, revealed in the unhappy experience of New York, that a restriction to employments for gain may nullify an attempt to cover public employments.[74] But the exception reaches even farther, to all those employed in the construction, maintenance, repair, or demolition of private dwellings and their out-buildings, and in analogous work or private grounds, as well as in similar work on or about the buildings and grounds of all the social, educational, re-

[73] In some of the European legislation it has been found necessary to make special provisions for work in gardens from which products pass both to the owner's table and to the market. Many similar cases might be suggested.

[74] This unfortunate situation in New York might have been prevented by the adoption of a provision, or definition, found in the Alberta act of 1908, section 11. "The exercise and performance of the powers and duties of a local or municipal authority or corporation shall, for the purposes of this act, be treated as the trade or business of the authority or corporation." Similar is a definition which New Zealand adopted later in the same year, in section 3 of her act.

ligious, and philanthropic bodies just mentioned, wherever the employment is arranged either directly or through an intermediary on such terms and conditions as fail to constitute him as "independent contractor," in the established legal meaning of that term.[75]

Not all of the questions of exclusion and inclusion faced hitherto are of equal importance; and none of them are of the very highest importance. It is true that they all have a serious significance for the persons concerned directly. It means something to the owner of a large estate that he does, or that he does not, find his staff of employees within the field of the compensation law; and it means more to them. For the widow of the Massachusetts waiter it meant much that she could have no compensation, because her husband had been a casual employee. And in every large jurisdiction there will be many whose interests will be affected in like manner and degree by any narrowing or broadening of the scope of the laws. But only a small part of all workmen are employed casually. Outworkers are few, relatively. Even public employees and those occupied otherwise than in the employer's trade or business make no large part of the total of those employed. The area and strength of a great nation are not affected much by the small windings of the frontier, by the bending out a few miles here or the drawing in a few miles there. Even the gain or loss of a province or two does not make or ruin a great state; although the shifting of boundaries and allegiance may mean much to those living within the territory which is transferred. It is the broad sweep of the frontier that makes the enclosed area large or small, adequate or inadequate to the requirements of a strong and effective national organization.

And so it is with the field of compensation. The great part of all employees are industrial employees, engaged regularly in one and another of the various branches of productive industry and in the usual course of the employer's trade, business, or profession.[76] And so the extent of the field is known approximately

[75] It is possible, but not probable, that the generalization of the text may be modified by the particular provisions of some of the statutes as to the relations between principals and their contractors and sub-contractors.

[76] The occupation statistics of the thirteenth census show 38,167,366 persons of 10 years or more engaged in gainful occupations. Of these not far from 24,600,000 were employees; and of these, in turn, not far from 20,800,000 must have been occupied in the business or profession of the employers, as against

when it is known what industries, trades, businesses, professions, employments, or occupations are included.

It would appear as a fair presumption here, as throughout this study, that a system as beneficent as workmen's compensation ought not to be limited in its application and, accordingly, that it should be extended to all employments without exception. Yet it has been the more usual practice of legislators the world over to limit the benefits of their statutes to certain employments or occupations, for the declared or implied reason that these are more dangerous than the others. So it was in the German act of July 6, 1884, which introduced workmen's compensation to the modern world; and so it is now, under the great German workmen's insurance code of July 11, 1911. So it has been and so it is now in the most of the jurisdictions of Europe and of the British Empire; and so it is in the three states of Latin America which have compensation laws. And so, naturally enough, it has been in most of the American states.

Four states, Connecticut, New Jersey, Ohio, and Wisconsin, make no mention of particular employments, either for inclusion or for exclusion, and thus appear to give their laws an unlimited field of application.[77] Among the other states there are two methods of limiting the field. Ten states make their acts apply to all employments which are not excepted specifically;[78] whereas the other ten name the employments to which alone their laws are to extend.[79]

some 3,750,000 employed otherwise, in public service, domestic and personal service, and minor non-industrial occupations. The 13,500,000 or more who were not employees consisted of a few large classes, 5,865,003 general farmers, 3,310,534 farm laborers at home, 1,195,029 retail dealers, and a number of smaller groups, heads of industrial enterprises, independent artisans, professional men and women, and others.

[77] Connecticut (B, 40) and Ohio (98) do except interstate and foreign commerce, and Wisconsin excepts interstate commerce by rail (8, 3). But such exceptions, which are to be found in about three fourths of the states, have no present significance, as they are made solely for constitutional reasons. Probably, too, they are superfluous.

[78] California, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, Rhode Island, Texas, West Virginia. The statutes of Nevada (21) and West Virginia (18) include lists of employments; but these are for administrative uses and not for marking the field of compensation. Both statutes are optional for all employments not specifically excepted: Nevada, 43; West Virginia, 9.

[79] Arizona, Illinois, Kansas, Kentucky, Louisiana, Maryland, New Hampshire, New York, Oregon, Washington.

There is a notable harmony in the specific exceptions of employments. With unimportant verbal differences, the ten states which determine their fields by the exception of employments all exclude domestic service and agricultural labor.[80] Moreover, three of the ten states whose acts could not reach agricultural labor and domestic service, since these are not in the lists of employments to be covered, take the quite unnecessary step of declaring positively that they shall not be included;[81] and Kansas makes a gratuitous positive exception of "agricultural pursuits and employments incident thereto."[82] Beyond these the specific exceptions are few indeed. Maryland further excepts country blacksmiths, wheelwrights, and similar rural employments;[83] and Texas excepts cotton ginning and, very strangely, railway common carriers.[84]

Since no state specifically mentions either domestic service or agricultural labor to be covered by compensation, these employments can not be included outside of Connecticut, New Jersey, Ohio, and Wisconsin. But Connecticut cuts out much the greater part of both employments by her limitation to employers having regularly five or more employees. In Ohio the two provisions that the law shall apply only to employers of five or more regularly and that it shall apply only to those employed in the employer's "trade, business, profession, or occupation" cut out all of domestic service and nearly all of farm labor. In Wisconsin the situation is as in Ohio, except that the numerical distinction is made at four instead of five.

As a result of these complicated provisions it may be said that American compensation laws generally do not cover domestic service or agricultural labor. Domestic servants are covered in Connecticut where their employer has five or more regular employees; and in New Jersey they are covered equally with other employees. Nowhere else in the United States are their employers either compelled to compensate them for their injuries or put under the constraint of the optional law to do so. There are, it is true, a good number of states in which they may be covered

[80] California, 14; Iowa, 1, a; Massachusetts, I, 2; Michigan, I, 2; Minnesota, 8; Nebraska, 6, 2; Nevada, 43; Rhode Island, I, 2; Texas, I, 2; West Virginia, 9.

[81] Kentucky, 14; Maryland, 62, 3; New York, 3, 4.

[82] Sec. 6.

[83] Sec. 62, 3.

[84] Part I, sec. 2.

by the voluntary election of employers.[85] Agriculture, which is to be understood as including landed industries generally, is covered but little more. In New Jersey it is covered equally with other employments. In Connecticut and Ohio it is covered when the employer has five or more regular hands; in Wisconsin, when he has four in a common employment. Like domestic service it may be covered in many states by unconstrained election.

To the plight of the farm laborer and the domestic servant a number of causes have contributed, as one may gather from the course of printed and oral discussion during some years past. It is believed widely that both of their employments are but little hazardous; and it is known by the thoughtful that the costs of compensation tend to be high where there may be only one, two, or a very few in a common employment, since insurance with its irreducible minimum of expense is dictated by the employer's prudence, if not by the statute. The voice of the unorganized laborer does not carry to the halls of legislation from the farm and the kitchen; whereas the agricultural employer, not always the quickest to see the ultimate advantage of radical social policies, is better organized and in some states has no small power in the making of the laws. There is a widely spread feeling that the intimacy of relations between domestic servants and their employers may assure for all those injured in domestic service a voluntary succor at least as generous as that which the compensation laws undertake to command.

Briefly, for now, be it said that the financial burdens and the administrative difficulties of compensations for small groups of employees, even for the solitary employee, are not too great to be faced. Briefly, too, be it said that the farmer and the householder may lack will or means to be generous and that the most free of bounties need not reject a standard against which its excellence may be measured nor scorn a means of recouping itself and thus preparing for a future exercise. But degree of occupational hazard and its relation to workmen's compensation can not be dismissed briefly: it has had too large a part in shaping the compensation policies of the world, and of the American states.

[85] How slight the effect of a voluntary compensation law is shown by the United States Bureau of Labor Statistics in Bulletin No. 126, p. 117. During more than three years only one firm had offered to take advantage of New York's voluntary law of 1910; and of that firm's 440 shop hands but 36 had been willing to confirm the employer's election by their own acceptance.

The exclusion of an employment from the field of compensation follows the acceptance of two propositions: the employment in question has, in fact, a low degree of hazard; and low hazard is reason enough for exclusion from the reach of the law. The first of these propositions, in its relation to domestic and agricultural labor, may be deferred for later examination in connection with the hazards of other employments. But the fundamental and general question whether a low degree of hazard, once fully established, is reason enough for the exclusion of an employment from the field of compensation must be faced now and squarely.

Something like an assumption that the magnitude of the evil of industrial accident in an employment is indicated by the degree of occupational hazard pervades a good part of early and current discussion of workmen's compensation. But such an assumption is not grounded on reason. It signifies nothing to a workman what his trade hazard may be, when he has lost an arm. So far as concerns the injured man and those who suffer with and through him it can signify nothing whether his occupation was or was not especially dangerous. The physical pain of the wound, the unhappiness of one sort and another attending the injury, and the loss of income and support are the same for the first sufferer and those dependent upon him whether his mischance is of the rarest occurrence or is such as may come now and again to all in his line of work and may be repeated a dozen times a week in his establishment or city. Come the blow rarely or often, when it does come there is the same need for solace and support. There is a latent belief in the minds of some, or a feeling, that those to whom the misfortune of accidental injury comes but seldom must be prepared for it in advance, or at least might be prepared, either by savings and insurance or by ability to borrow. But it is not so generally. In many of the least hazardous employments the earnings are so meager as to preclude the possibility of preparing in advance for even the rarest of misfortunes.[86]

[86] If one may judge by the rates charged for accident insurance or compensation insurance, the making of corsets, hosiery and knit goods, leather gloves, millinery and laces, and silk goods are among the least dangerous branches of manufacturing. But the average yearly wages, as shown by the federal census returns for 1909, are too low to permit any preparation for rainy days: corsets, $368.03; hosiery and knit goods, $346.08; leather gloves, $419.59; millinery and laces, $416.02; silk goods, $389.59. Nor must it be supposed that, at the other extreme, the men in the hazardous callings have earnings high enough to cover their risks. Few generalizations were presented more confi-

For the employer the case is simplicity itself. If accidents seldom come in any trade, so much the less to be paid or advanced by the employer, or so much the less to be paid for compensation insurance. For society and the state it signifies not very much merely to know the trade hazards. To know the numbers occupied in the trades is more important. Even though farm labor were as free from danger as legislators have assumed, there would be more injuries every year in American agriculture than in any single branch of manufacturing; for 12,000,000 people worked on American farms in 1910. And our concern and desire to relieve should be measured by the numbers of the injured, not by the degree of their concentration in any trade. Neither the labor nor the expense of enacting or administering a compensation law is per capita of those covered. Burning lime in New York may be eight times as dangerous as making hosiery or knit goods; but it is more urgently the duty of the state to cover the latter branch of industry, for there are 450 times as many engaged in it as in the former.

Of financial or other practical difficulties in covering the least hazardous employments there are none which, strictly or properly, are connected with the degree of hazard. The average small size of some of the less dangerous undertakings and their non-industrial character here and there have been examined in another connection. Suffice it to say that there are no insuperable difficulties in the way of covering even the least hazardous of occupations, whatever their size or nature. Of this there is proof in the experience of jurisdictions within our own boundaries, as well as abroad. Belgium has covered the least hazardous of industries, and small ones, since her beginning in 1905. In other foreign lands the direction of change, after experience, always is toward the inclusion of less dangerous employments. Since 1906 the United Kingdom has covered all employments without exception. In the United States one of the earliest of the statutes, that of New Jersey, has been equally comprehensive from the first.

There remains, however, another consideration which can not be ignored in the United States. It could have had no weight in the foreign lands where workmen's compensation was developed first and with it the policy of restriction to supposedly dangerous

dently by the investigators of five years ago than that earnings in America do not vary with occupational hazards. See, *e.g.*, the New York report, part 1, pp. 7, 26.

occupations; for there legislatures were free from constitutional limitations upon their powers. But when the earliest American bills were prepared there was real doubt as to the possibility of any valid compensation laws under the federal and state constitutions. And there was a general opinion among lawyers and others that hazardous occupations might be brought under the police power of the state, even if no others might.[87] It was for this reason that the New York compulsory act of 1910 was limited to certain groups of employment which were declared to be "especially dangerous" and attended by "extraordinary risks."[88] The adverse decision of the New York Court of Appeals upon the constitutionality of a compulsory compensation act, the subsequent judicial approval of a compulsory act in Washington,[89] the adoption of constitutional amendments specifically to authorize compulsory acts in Arizona, California, New York, and Ohio, the unshaken validity of the fourteenth amendment to the federal Constitution, and the present pendency of another Washington case in the Supreme Court of the United States[90] combine to make the constitutional problem of degrees of hazard in compulsory compensation laws one which a layman may decline to discuss.[91]

[87] See the report of the Chicago conference of November, 1910, pp. 31, 238. The principle that a justification for regulation under the police power of the state was found in the dangers of an industry had been established firmly for a great many years. Recently it had been affirmed by the highest court in the land in terms as direct and explicit as could be chosen. "The dangerous character of the thing used is always to be considered in determining the validity of statutory regulations fixing the liability of parties so using it." Quoted with approval by the United States Supreme Court in the case of *St. Louis and San Francisco Railway Co.* v *Mathews* (Jan. 4, 1897), 165 U.S. 1. Even the New York Court of Appeals, which invalidated the New York act of 1910, recognized this same principle with entire frankness and fullness. "There can be no doubt, we think, that all of the occupations enumerated in the statute are more or less inherently dangerous to a degree which justifies such legislative regulation as is properly within the scope of the police power." *Ives* v. *South Buffalo Railway Co.* (March 24, 1911), 201 N. Y. 271.

[88] New York report, part 1, pp. 1, 47, 52.

[89] *Ives* v. *South Buffalo Railway Co.* (March 24, 1911), 201 N. Y. 271; 94 N. E. 431. *State ex rel. Davis-Smith Co.* v. *Clausen, Auditor* (Sept. 27, 1911), 65 Wash. 156; 117 Pac. 1101.

[90] *State of Washington* v. *Mountain Timber Co.* (Oct. 6, 1913), 75 Wash. 581; 135 Pac. 645.

[91] Fortunately, there has been presage of judicial wisdom sufficient to grasp the meaning of workmen's compensation and preserve it for the country, even after the humbuggery of designating "especially dangerous" employments is at

It is enough now to note that of the five states with compulsory laws—six, if Arizona be counted—but two, California and Ohio, have ventured to abandon the pretense of limiting their acts to the especially dangerous employments.

But, in the early years of constitutional scruples and fears, the states turned oftenest to the device of the optional act; and of this type now are some seventeen of the statutes. And the optional nature of the acts removes all need of appealing to the police power for authority to enact, or at the least all necessity of seeking to assure constitutional validity by a restriction to the more hazardous occupations. Statutes of this optional character have been sustained by the highest state courts or by courts of intermediate appeal in Massachusetts, Minnesota, New Jersey, Ohio, Texas, and Wisconsin, where there is not a pretense of restriction to the more dangerous occupations, as well as in Kansas and Illinois, where there is;[92] and their constitutionality is not open to serious doubt. Only in Kentucky can be found an adverse decision, a divided and inconsistent one.[93] In the states, then, which have optional statutes there can be found no constitutional reason for a restriction to the more hazardous employ-

an end. The declaration of the United States Supreme Court through Mr. Justice Holmes has cheered many with the hope that, in due time, the highest authority in the land will destroy for good and all whatever of precedent there may be now in the adverse decision of the New York Court of Appeals upon a compulsory compensation act. Of the police power the court declared: "It may be put forth in aid of whatever is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." *Noble State Bank* v. *Haskell,* Jan. 3, 1911, 219 U. S. 104.

[92] Massachusetts: *In re Opinion of Justices,* 209 Mass. 607; 96 N. E. 308. Minnesota: *Matheson* v. *Minneapolis Street Railway Co.,* 126 Minn. 286; 148 N. W. 71. New Jersey: *Sexton* v. *Newark Dist. Tel. Co.,* 84 N. J. L. 85; 86 Atlan. 451. Ohio: *State* v. *Creamer,* 85 Ohio St. 349; 97 N. E. 602. Texas: *Memphis Cotton Oil Co.,* v. *Tolbert,* 171 S. W. 309. Wisconsin: *Borgnis et al* v. *Falk Co.,* 147 Wisc. 327; 133 N. W. 209. Illinois: *Deibeikis* v. *Link Belt Co.,* 261 Ill. 454; 104 N. E. 211. Kansas: *Shade* v. *Ash Grove Lime and Portland Cement Co.,* 144 Pac. 249.

[93] *Kentucky State Journal Co.* v. *Workmen's Compensation Board,* 161 Ky., 562; 170 S. W. 1166. The court was divided, 4 to 3; and the minority submit a vigorous dissenting opinion, 170 S. W. 437. In denying a petition for a rehearing, 172 S. W. 674, the court declares that the act, of the familiar optional type, is unobjectionable for the employer; whereas it had said in the original opinion, *inter alia;* "We cannot subscribe to the proposition that this is a voluntary contract, even for the employer."

ments. If the less hazardous employments are not to be covered, some other reasons than the constitutional one must be given.

Although there are now but eleven valid compensation laws which list the employments to be covered, and although from the beginning until now but seventeen such laws have been enacted, yet, upon the basis of apparent filiation, the lists fall into seven distinct classes. (1) Aside from the early Maryland acts, which sought in vain to establish state compensation funds for some few industries, the earliest American act to carry a list was the well-known New York compulsory act of 1910, with its eight groups of "especially dangerous" industries. On the day this statute was declared unconstitutional the governor of Nevada approved his state's first compensation act, which rested squarely upon the New York list with some additions and some omissions; and three weeks later the same list appeared again, although now with greater changes, in the New Hampshire act. The next year, 1912, this list, or the Nevada revision of it, with a few further changes, was made the basis of the first Arizona act. Nevada later rejected this list in favor of another one; but parts of its phrases and its outline are extant still in the present laws of New Hampshire and Arizona.[94] (2) Washington adopted in 1911 a much longer list designed to embrace all the "extra hazardous" employments within the state. Two years later this list, with some changes, was adopted by Oregon and Nevada, the latter now abandoning the brief list she had borrowed from New York.[95] (3 and 4) In 1911 Kansas and Illinois based their compensation systems upon brief and distinct lists; and in their later and revised statutes of 1913 they made but little change in their original lists.[96] (5) The West Virginia law contains an entirely independent list, a long one arranged in 23 or 24 groups; and last year Kentucky took over both individual items and groupings.[97] (6) The long list of New York's present law, with its 42 groups, was adopted promptly by Maryland in her new compulsory law.[98]

[94] New York, c. 674 of 1910; Nevada, c. 183 of 1911; New Hampshire, c. 163 of 1911; Arizona, c. 14 of 1912.

[95] Washington, c. 74 of 1911; Oregon, c. 112 of 1913; Nevada, c. 111 of 1913.

[96] Kansas, c. 218 of 1911, c. 216 of 1913; Illinois, p. 314 Laws of 1911, p. 335 Laws of 1913.

[97] West Virginia, c. 10 of 1913; Kentucky, c. 73 of 1914.

[98] New York, c. 816 of 1913, validated by c. 41 of 1914; Maryland, c. 800 of 1914.

(7) The Louisiana list again is an entirely original one.[99] It is noteworthy that in no state has there been a change of policy, from enumeration to sweeping inclusion, or in the opposite direction. It is further noteworthy that all of the four acts passed in 1914 were based upon enumerated lists of industries to be covered, in Kentucky, Louisiana, Maryland, and New York.

In a provisional and very rough way of speaking, it may be said that the apparent purpose of the listing states is to cover about the same field. None of them includes either agriculture or domestic service; and, so far, all are in accord with what is, in practical effect, the prevailing policy of the other states. But an important difference appears at once, in that, by failure to mention, these states exclude the whole realm of trade and commerce, as distinguished from transportation, and all of the personal and professional employments. The field to be covered by the lists is, in a general way, mining, manufacturing, construction, transportation, and communication, what sometimes we call the industrial pursuits, in a narrowed meaning of the word. But the fullness with which this broad field is covered varies within no unimportant limits.

On the basis of method or manner of listing the states fall apart into two classes: Arizona, Illinois, Kansas, and New Hampshire rely upon brief lists with broad and general terms.[100] Arizona does, indeed, have ten groups of industries and Illinois eight; but New Hampshire has only five descriptions, and Kansas is briefer still. On the other hand, eight states employ many quite specific terms, West Virginia and Kentucky arranging theirs in 23 groups and New York and Maryland theirs in 42. It is not true that none of the four states in the first class use any specific designations, nor that none of the eight in the other class use any broad and general terms; but a difference of the sort indicated there is. Two other differences of method in the listings must be noted. In part, the employments are designated by terms of trade or business, as structural carpentry, bookbinding, or the manufacture of textiles; in part, they are designated by terms of instrument or agency, as the use of machinery or compressed air; in part, by reference to situation or environment, as on scaffolds or in dangerous proximity to explosives

[99] Act 20 of 1914.

[100] Arizona, 67; Illinois, 8, b; Kansas, 6; New Hampshire, 1.

or noxious gases. And again, in some of the states, the lists are closed definitely, not to be extended by any process short of legislative enactment; in others provision is made for administrative or judicial enlargement of the lists, as experience may appear to warrant or require.

By the varying uses of these different methods of designation and listing, the fields of compensation in the several states are limited more or less and so are made more or less inadequate to the requirements of the industrial situation and of the declared or implied principles of the statutes. In part, the limitations doubtless have been intended, whether they are or are not consistent with the professed principles of the lawmakers; but, in part also, the limitations are due to carelessness in drafting or to the great inherent difficulties of adequate listing.

As the Arizona list was prepared in professed compliance with the constitutional mandate to cover such employments as the legislature might "determine to be especially dangerous," and as no provision is made for enlargement, the fair presumption is that it was intended to be complete.[101] The employments are designated in part by terms of industry or business and in part by terms of instrument, agency, or situation; and, one way with another, the bounds of the field marked out are reasonably definite. Mining, quarrying, the railroad industry in all its parts, and manufacturing with mechanical power are covered fully by broad and direct terms. A reference to "wires, cables, switch-boards, or other apparatus or machinery" charged with electricity will bring in the telephone, telegraph, and electric light and power plants. The general field of construction is divided. Covered by direct statement are railway construction, tunneling, the construction of subways, viaducts, and pole lines, the use of elevators for hoisting building materials, and all construction with iron or steel frames or at an elevation of twenty feet or more; covered, too, will be some part of general earth work by the reference to the use of explosives. But there are unfortunate omissions, quite aside from that general omission of the agricultural, commercial, domestic, professional, and personal employments which is common to all the listing states and which need not be noted expressly in each case. No manufacturing or repairing without power is covered; nor is transportation otherwise than by rail.

[101] Sec. 67.

In construction much employment is left outside the law, all the run of construction in wood, stone, brick, and similar materials at lower elevations than twenty feet and without frames of iron or steel, street and road work without the use of explosives, and so on.

The superiority of the Illinois list among the dozen in the United states is in its brief and general terms. It purports to include the "occupations, enterprises or businesses" which are extra-hazardous, and it indicates them in eight groups, the first five through terms of industry or business, the next two by terms of agency or situation, and the last and most important by a reference to any public safety regulations, present or future. The first three are these: "(1) The building, maintaining, repairing or demolishing of any structure; (2) Construction, excavating, or electrical work; (3) Carriage by land or water and loading and unloading in connection therewith." The omission of all direct reference to manufacturing, machinery, or mechanical power is not serious, in view of the eighth group, which covers "any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use, or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein." Readers of the AMERICAN ECONOMIC REVIEW will need no comment upon the comprehensiveness of the expressions in this law. Probably the drilling and operation of gas and oil wells might be construed as mining, since terms so general will be construed liberally; and a vessel may be counted a "structure"; but, in any event, the gas and oil wells and the ship-yards will be covered under the last group. In short, only very small and unimportant industrial employments can be outside the field of compensation in Illinois. The agricultural, domestic, commercial, personal, and professional employments are not covered; nor, probably, is manufacturing and repairing without machinery.[102]

The Kansas list, as given directly and formally, is brief enough to quote in full. "This act shall apply only to employment . . . in or about a railway, factory, mine or quarry, electric, building or engineering work, laundry, natural gas plant, county and municipal work, and all employments wherein a process requiring the use of any dangerous explosive or inflammable materials is

[102] The Illinois list is found in section 3, b of the act.

carried on."[103] But the effective meaning of the list is fixed rather in a later passage in which its chief terms are given a formal definition.[104] Railway is defined to *include* street and interurban lines; and employment on railways is defined to *include* certain forms of work, in shops, depots, and other fixed places. So far there are no restrictive definitions; and the terms may preserve the widest meanings ever proper to them. For the other terms, however, it is declared that they shall *mean* so and so. Here, then, are limiting definitions; and no form of employment can be included under factories, mines, quarries, electrical work, building work, or engineering work unless it is indicated fairly by the very detailed words of the formal definitions. The Kansas list remains broadly comprehensive, notwithstanding all the minute specifications of the defining section. The meaning of a factory is narrowed only to the extent of excluding places of hand work, since, among the score or two of needless specifications, there may be found the saving phrase, "any place wherein power is used." From a similar broadness of definition generally it results that no considerable part of industrial employment is left uncovered. Aside from the general omissions, which need not be mentioned here, these may be noted: manufacturing and repair without power, transportation otherwise than by rail, excavation and earth work where shoring is not "necessary."

Louisiana marks her field of compensation by naming some hundred or two of "hazardous trades, businesses, and occupations";[105] and she covers pretty completely the field of the industrial occupations, not so much by virtue of her many specific designations as by the several comprehensive terms which recur from place to place. Her act is to apply to the "operation, construction, repair, removal, maintenance, and demolition of railways, . . . vessels, . . . factories, . . . mines, . . . quarries" and a number of other plants or works, to "any work in the building or metal trades" in construction, and to the use of explosives, "boilers, furnaces, engines and other forms of machinery." These expressions alone cover nearly everything; and there is no particular harm done by putting into the act also the names of all the different kinds of plant or place of work anybody could think of. It is not easy to see how people can ever be employed

[103] Sec. 6.

[104] Sec. 9.

[105] Sec. 1, 2.

in moving railroads and mines: still there is no harm in providing for the unlikely. In some respects the Louisiana list is fuller than most. It specifies waterworks, the harvesting of ice, farm or plantation work with harvesting and threshing machinery, and some of the coarser forms of trade, stockyards, coal and lumber yards, and building material yards. As the list stands, and with all of its comprehensive terms of agency and process, certain minor forms of industrial employment, perhaps, are not covered, as transportation otherwise than by rail or water, some branches of earth and rock work without explosives or machinery, road making without machinery, the erection of pole lines. It is not, however, of great consequence if there are gaps in the list; for the statute makes wise provision for the inclusion of any other hazardous employments which may be revealed. If the hazardous nature of the employment, and its consequent inclusion, can not be determined by agreement between employer and employee, a decision may be made by "the judge of the court which shall have jurisdiction over the employer in a civil case."[106]

The list of Nevada may be dismissed with few words. It is not prepared to mark the field of the act, which is optional for all employments except domestic and farm labor, but is merely a list of groups of employments arranged for the rating of compulsory state insurance premiums upon such employers as may have elected the act.[107] It is identical with a similar grouping of Washington, save in two particulars. As becomes an arid inland state, it omits the water employments, longshore work and work in dry docks, and the like. And it adds at the end a class of "all other employments not herein specified."

New Hampshire is different from the states just considered and soon to be considered, in that she, manifestly, had no purpose to cover as broad a field as the others. Her designations, be it remembered, are copied in part from the New York act of 1910; but she made important changes. New York had made no attempt to cover mining or manufacturing generally, but had devoted five of her eight classes to the rougher and more dangerous branches of construction work. New Hampshire adopted from New York the designations for the railway industry and for the use of electricity and explosives; but she omits all reference to the construction work, and substitutes two very different descrip-

[106] Sec. 1, 3.

[107] Sec. 21.

tions, one of mines, quarries, and foundries, and the other of factories and other places where five or more persons are engaged in manual or mechanical labor near power-driven machinery.[108] As New Hampshire is one of the few states which make no reference whatever to agricultural or domestic employments, these will be covered if ever they satisfy the conditions of the statute, proximity to power machinery or the use of explosives or electricity. Aside from the important omissions, in commerce, personal, professional employment, and the rest, New Hampshire is to be remembered for her omission of the very important and dangerous building and construction trades, the rock and earth work, and the related branches of employment. Transportation on the streets and highways is not covered, nor transportation by water except for the enginemen on steamers. The dangerous and important forest and driving work of the New Hampshire lumber industry is not included. Of course, any of the occupations which are omitted, generally, are covered when and in so far as they satisfy the conditions of place and agency laid down in the statute.

Washington presents three successive lists of employments.[109] The first and briefest is the one which, in form, fixes directly the field of compensation. It is presented with the declared purpose of making it include all of the "extra hazardous" employments within the state; but it is followed by the provision that, if there be or shall arise any other extra hazardous employments, they shall be added and shall be rated for compensation insurance premiums by the industrial insurance department until the legislature may take action. In the second list substantially the same range of industries and occupations is presented in different and somewhat more specific terms and so at greater length, but now in groups and with basic, statutory, or maximum rates for contributions into the state accident fund. In the third list the field indicated is again about the same, although the terms are not quite the same but again are more specific and correspondingly more numerous than before. Here, too, the industries are rearranged in 46 classes for separate accountings in the state fund. Each successive list will be found to enlarge a little upon the one just before it; but all three, as being in the statute, must be taken as the word of the legislature in determining the field of compensation in Washington.

[108] Sec. 1.

[109] One in section 2 and two in section 4.

What with her repeated and varied presentations of her lists, with her combined use of terms of industry, of agency, and of situation, and with her wise adoption of broad and general designations, it is not likely that Washington fails to cover many employments which she did not intend to leave uncovered. Aside from the agricultural, domestic, commercial, professional, and personal occupations, it was the evident purpose of the legislature not to include any form of manufacturing without power except the making of spars and masts and the dressing of stone. Thus hand laundries, blacksmiths' shops, dye houses, canneries of fish or fruit, and fruit packing are not covered where no power machinery is used. Excluded, too, or omitted, are transportation by team, automobile, or sailing vessels, express as distinguished from the railway business, and, apparently, some trivial forms of construction and installation. However, it is not worth while to search out in advance defects in the Washington lists: the provision for administrative enlargement permits a prompt and easy correction of any defects which experience may reveal.

Oregon has marked out her field of compensation by taking over outright the first of the Washington lists and by broadening a little some of its terms when later arranging two classes, or groups, of employments for contributions to the state insurance fund.[110] Oregon omits, however, the Washington provision for an extension of the list, and thus presents it as closed. To the omissions indicated in the Washington statute should be added manufacturing without power, as dressing stone and the making of spars and masts, storage and warehousing.

The lists of West Virginia and Kentucky are the same, both in specific designations and in arrangement in 23 classes or groups;[111] and, together with the lists of New York and Maryland, they illustrate the enumeration of employments at its worst. The underlying fault of the lists in these four states is in their chief reliance upon a great number of narrowly specific designations and their failure to employ also the general phrases which have prevented unintended and serious omissions in such states as Washington, Illinois, and Louisiana. In West Virginia, however, and

[110] Secs. 13 and 18.

[111] West Virginia, 18; Kentucky, 15. There are a few differences, a word or a letter here and there, perhaps clerk's or printer's errors. For Kentucky, as for other states in the past, I am indebted to the Aetna Life Insurance Company for a reprint; but the company's reprints are quite reliable.

Kentucky shortcomings are not of serious practical consequence. The Kentucky act has been nullified, as unconstitutional; and the West Virginia list serves, not as a determinant of the field of compensation, but as a basis for premium rates upon such employers as elect the general optional law of the state by insuring in the fund administered by the public service commission.

Some brief comment, therefore, will show sufficiently the failure of these two states to accomplish their apparent purpose and cover the general work of mining, construction, manufacturing, and transportation. The designations of the lists are primarily in terms of industry or establishment,[112] as coal mines, paint factories, iron and steel mills; and it is only in a subordinate way that some employments are indicated by reference to their materials or agencies. Some broadly inclusive terms are used: "transportation systems," "working in or with textiles," "in or with iron or steel," "wooden wares," "glass houses of all kinds," "rubber goods," "working with leather," "articles of an explosive nature," "carpenter work," "structural work," "stone or brick work." Yet it is probable that no expressions can be found which cover any of the following: boat building without scaffolds; dredging; construction of telephone and telegraph lines; transportation on roads and streets; digging of wells; longshore work; warehousing and storage; distilleries (in Kentucky!) and cider mills; the manufacture of an indefinite variety of products in any other metal than iron or steel, provided that they are made by other process than stamping; the production of agricultural implements, musical instruments, optical and photographic goods, paper products generally, starch, sugar, glucose, jewelry, clocks, roofing, felts, varnish, and a score or two of other minor articles, as buttons other than of wood, toys, thread, brushes and brooms. Indeed, there are so many omissions that one wonders whether in West Virginia and Kentucky it really was the intention to cover quite as wide a field as in the other states. But the industries and employments omitted have no qualities or conditions in common. And yet it scarcely could have been mere oversight. Could a Kentucky legislator forget the distilleries of his state?

The industrial prominence of New York has made her earlier experience with workmen's compensation well known to all stu-

[112] Naturally so, since, in the place of origin, West Virginia, the list and its groupings were for arranging and combining employers for the proper adjustment of their insurance rates.

dents of the general subject. The act of 1914[113] undertakes to make compensation compulsory in the "hazardous employments" mentioned in section two; and these are arranged in 42 groups for the permissive formation of employers' associations to prevent accidents. Naturally, therefore, the employments are indicated commonly in terms of industry, business, or establishment, as ship building, pulp and paper mills, manufacture of glass, milling, power laundries, stone cutting. But employments are also designated by their agencies or processes, as the operation of engines and boilers, cars, trucks, wagons, and other vehicles, and by their situation or environment, as subaqueous construction and work in compressed air. There are a number of general terms, notably terms of materials and products, as "wooden wares," "glass products," "sheet metal products," "leather goods and products," "rubber goods," "metal wares"; and these may be construed to cover a great deal. But the striking characteristics of the New York list are its minutely specific mention of particular products, from car shops and locomotives to corrugated paper boxes, pickles, and printers' rollers, and its entire lack of sweepingly comprehensive expressions of any kind.

Although the New York act does not deserve all of the unfavorable comment which it has received,[114] yet adverse criticism will lie against it at many points, both within and without the narrow range of those provisions which alone are to be considered here. There are such ambiguities, or obscurities, in single words or terms of section two and in their relations to different parts of the section and of the act as nobody can presume to solve or remove by any process of close and confident reasoning; and for the clearing away of these we must await the more or less arbitrary decisions of the courts.[115] It would not answer to interpret the

[113] C. 41, repeating, with one or two minor changes, and validating c. 816 of 1913, which had been passed and approved before January 1, 1914, the date when the constitutional amendment authorizing it went into effect.

[114] *E.g.:* I. M. Rubinow, in *The Survey,* vol. 31 (Feb. 21, 1914), p. 642; H. B. Bradbury, in *Market World and Chronicle* for March 28, 1914, p. 398.

[115] Does the handling of cargoes or parts of cargoes of coal, grain, and lumber "on any place" include the work, or at least the yard and delivery work, of the coal, grain, and lumber dealers? If not, some rough and dangerous work is not covered. If so, then by similarity of interpretation the handling of "general merchandise" must include the work of the general merchant. Are all employees in the specified "trades, businesses, and occupations" to be covered? or only those who are in hazardous tasks within the businesses? The employee is defined as a "person who is engaged in a hazard-

words of the New York act strictly as the common usage of men would dictate, or even in strict accordance with the general principles which the courts have sanctioned for the construction of statutes. Were that done, the deficiencies of the list would be without end.

It was the evident purpose of the legislature to cover manufacturing completely. And a considerable number of manufacturing industries, for which there is no obvious or natural place in the list, may be forced in here and there, albeit in very strange relations, by a literalism of interpretation which may be justified by the liberal purpose of the statute but which will need to be both strict and energetic. Watches assuredly are "metal wares," for the most part, and as such they may be grouped with "small castings or forgings, . . . nails, wire goods, screens, bolts, metal beds" and similar products; although it is not easy to understand how manufacturers of goods so different can be united wisely in developing common policies for the prevention of accidents. Diamond cutting, is, of course, "stone cutting or dressing," and as such finds a place, although not a natural place, in association with "marble works; manufacture of artificial stone; steel building and bridge construction; installation of elevators"; and a dozen other like activities. Lenses for optical appliances certainly are "glass products," and may be grouped with bottles, window glass, and pottery.

But there is a limit beyond which such methods of interpretation can not be forced; and that limit has been reached, or passed.[116] For certain materials of production are not mentioned at all, paper, cotton, silk, hair, bone, shell, and, probably, others; and into some goods different materials enter in such measure that the result can not be pronounced a product of one or another. A phonograph is neither a wooden ware nor a metal product. A brooch is neither a metal product nor a stone ware, whether it is made with precious, semi-precious, or common stones. Group 37

ous employment in the service of an employer." Does the "preparation of vegetables, fish, or food-stuffs" cover the work of the cook in a hotel or restaurant?

[116] "The words of a statute will be construed in their plain, ordinary, and usual sense, unless such construction will defeat the manifest intent of the legislature." Supreme Court of Indiana, Jan. 28, 1913, in case of *Booth* v. *State,* 179 Ind. 405, 100 N. E. 563. "It is true that words of common usage should be given their ordinary meaning." Supreme Court of Washington, Oct. 7, 1913, in case of *No. Pac. Ry. Co.* v. *Concannan,* 75 Wash. 591; 135 Pac. 652.

includes the "manufacture of textiles"; but there is no place, either in this group or in any other, for those who, in the words of the West Virginia and Kentucky statutes, work "in or with textiles," who use textiles as raw materials but do not manufacture textiles, who make banners, badges, pillows, quilts, tents, awnings, and so on. No more is there place for the manufacturer of braids, fringes, embroideries, laces, and the like, of hammocks, nets, and nettings. Some other of the miscellaneous products of manufacturing which appear to have been omitted may be named without comment: artificial limbs; clocks; cotton, batting, absorbent, and packing; fans; inks, other than printing; jewelry; linoleum; music rolls; musical instruments, other than pianos and organs, "metal products," and "wooden wares"; paste; pencils; picture films; starch; tennis balls; base balls; whips. As the law gives no evidence of a discrimination between hand and machine work, it is relevant to note that such businesses as those of the photographer and the taxidermist are not covered.

Groups 1-7, 11-13, and 42 reveal a purpose to cover the general range of construction work in its broadest sense, in earth and rock work, on buildings, bridges, and other structures, and on installations. Yet there are a number of employments in this part of the field which are omitted: road making and repairing; clearing and grading land; landscape gardening; the work of the tree experts; driving wells; paper hanging; and some installations, as of vaults, tubes, chutes, carrier systems, bells, lightning rods, and machinery not "heavy." Of a somewhat similar nature, and of no small importance in New York, is the harvesting of natural ice. Of greater importance are the fisheries and oyster culture, both of which are omitted.

It is possible, even probable, that in New York, as in the other states, an energetic search might discover in the list places for some of the employments which have been mentioned as omitted; but it is not improbable that repeated scrutiny might reveal still other omissions. Indeed, but half of those which are apparent have been mentioned. And it is enough that there are omissions of considerable number and importance: let the exact number be determined through experience under the laws. The omission of the general classes of the agricultural, domestic, personal, professional, and mercantile employments, common to New York and the other states, needs but to be noted in passing. And the imperfections of the New York list, such as they are, must remain,

at least for a time, as the list is a closed one, not to be opened or enlarged otherwise than by an act of the legislature.

The list and the groupings of the Maryland statute are, save for some four or five minor particulars, identical with those of New York.[117] The unfortunate consequences which might result from a closed list appear to have been realized in Maryland; and an attempt was made to prevent them, by the addition of a forty-third group, to include "all extra-hazardous employments not specifically enumerated herein." But nothing can come of this. For the law defines extra-hazardous employments as those "described in section 32 of this act.[118] Only those employments already grouped can be included. It is like providing a landing stage exclusively for those who already have come ashore or a naturalization bureau for those who are citizens already.

Improbable though it may appear in some of the large cases, the most of the omissions of particular occupations, within manufacturing, mining, and construction, must have been by inadvertence or lack of skill in drafting rather than by deliberate purpose. Certainly there are no ascertained differences of hazard to justify the discriminations. In Connecticut there are no omissions or exclusions whatever of employments or occupations; and the manual of rates for compensation insurance in that state can not be an altogether unreliable index of the degrees of danger in the various callings. And, by the showing of this test, the New York law covers by express mention a great many employments much less dangerous than some of those which are omitted.[119]

[117] C. 800 of 1914, sec. 32. Maryland drops dredging from group 11, artificial ice from group 25, and hauling with horses or mules from group 41: the New York expression, "explosives and dangerous chemicals" in group 25 becomes in Maryland "explosive and dangerous chemicals."

[118] Sec. 62, 1.

[119] One can not always match exactly the designations in the New York act with those given in the Connecticut manual for industries which are actually carried on in Connecticut; but some comparisons are possible and striking. The rates now to be quoted are stated in the familiar form, percentages of the pay-roll. Some of the industries covered in New York, as generally in all of the states, have premium rates so low as to prove a very slight occupational hazard: silk goods, .29; millinery, .32; cigars, .34; fur goods, .34; corsets, .34; cloaks, .34; boots and shoes, .43; hatters, .46; hosiery, .46; brushes, .48; brooms, .48; carpets, .57; bookbinding, .57; photo-engraving, .57; printing, .57. For industries apparently omitted in New York, rates are as follows: hand laundries, .69; taxidermists, .75; manufacture of paste, .75; emery cloth, .98; metal polish, 1.03; boat-house employees, 1.09; manufacture of

And similar comparisons in other states doubtless would disclose similar conditions elsewhere.

Nor is there established appreciably better justification for the larger omissions and exclusions of the American compensation laws. The hazards of commercial employments have a low average: the store risks of ordinary retailers in general trade are very low. But those handling agricultural implements, hay and grain, coal, lumber, and building materials face at least an average risk; and those who deal in horses and cattle, junk, or paper stock approach the highest of occupational hazards.[120] Employment under most professional men is not particularly dangerous; although the service of engineers, chemists, surveyors, and others is far from being the safest of occupations. Domestic service is not dangerous. But there is great error in the common assumption of legislators and others that agricultural labor is but little hazardous. While in some quarters there are recent evidences of a disposition to exaggerate the perils of farm labor, it is reasonably certain that they are distinctly greater than the average for all of the factories of the country taken together; and they are much greater than are faced in the textile mills of the land, which are everywhere covered by our compensation laws.[121]

In short, our practice of declaring nearly or quite all branches of manufacturing, to say nothing now of other industries, "especially dangerous" or "extra-hazardous," as a preliminary to the enactment of compensation laws to cover them, is a transparent and unreliable subterfuge. Nobody who has real knowledge supposes that these declarations mean anything, least of all anything

lamp shades, 1.20; linoleum, 1.25; paper hanging, 1.32; manufacture of lampblack, 1.68; bill posters, 1.72; surveying, 1.80; clearing land, 1.84; oystermen, 3.00; livery employees, 3.44; harvesting ice, 4.37.

[120] The Connecticut rate manual for compensation insurance gives the following figures: agricultural implements, .72; hay, straw, and feed, .86; hides and leather, .86; lumber, coal, and building materials, 1.80; cattle, 3.06; horses, 4.37; rags and paper stock, 5.75; junk and scrap iron, 6.90.

[121] The former entire neglect of statistical returns of industrial accidents in this country, the present general omission of agricultural employment from the purview of workmen's compensation boards and industrial commissions, and the impossibility of judging American conditions closely by even the most carefully prepared of European statistics combine to prevent any accurate generalizations as to the relative dangers of farm labor and other employment in the United States. But the charges of the insurance companies for their long-familiar accident policies have been such as to prove the very considerable degree of danger attending farm labor.

that is true. Doubtless the judges, our unquestioned guides in the way of what is reasonable, permissible, and proper, having recognized the dangers of industries and employment as justification for public regulations of various sorts, have allowed the legislatures a wide discretion in determining what degree of danger may justify regulation.[122] But the notorious inconsistencies of our present discriminations and classifications may not forever escape the judicial condemnation which they merit. There is a limit of judicial tolerance, as has been shown by the decision in the Lochner case, and in other cases. As courts long have refused to accept without question the legislative judgment as to the reasonableness of laws fixing rates of charge for railways and for public service corporations generally, and have been guided by their own judgments as to the fairness of rates and profits, so we soon may find the courts taking cognizance of the preposterous assumptions upon which the lists of "extra-hazardous" occupations are prepared for the compensation laws. Except for New Hampshire there is not a state among the dozen with enumerated lists whose evident purpose is not to cover the range of industrial employments, from the textile operative's to the structural iron worker's. It makes little difference or none whether the label is "extra hazardous" and "inherently constantly hazardous," as in Washington, "extra-hazardous," as in Illinois and Maryland, "especially dangerous," as in Kansas, "hazardous," as in Louisiana, "dangerous," as in New Hampshire, or whether there is no label at all, as in West Virginia; the occupations covered are substantially the same. Will there never be an end of this miserable pretense of self-deception? Will not legislators dare to go where an eminent judge has invited them to go?

It is frankly admitted by appellant that it is within the legislative power to make this change with regard to the hazardous trades, but not with regard to what are called the non-hazardous trades. But why not? . . . We see absolutely no ground for the contention that

[122] "Classification for the purposes of taxation or of regulation under the police power is a legislative function, with which the courts have no right to interfere, unless it is so clearly arbitrary or unreasonable as to invade some constitutional right." New York Court of Appeals, March 24, 1911, in case of *Ives* v. *South Buffalo Ry. Co.*, 201 N. Y. 271. "That is to say, as the power to classify is not taken away by the equal protection of law clause, a wide scope of legislative discretion may be exerted in classifying without conflicting with the constituional prohibition." United States Supreme Court, May 31, 1910, in case of *Louisville and Nashville Ry. Co.* v. *Melton*, 218 U. S. 36.

these defenses may be lawfully abrogated as to the more hazardous industries, but must be forever held sacred as to the less hazardous industries. There may be a less persuasive reason for the change in the case of the latter class of industries, but this does not deprive the legislature of the power to make it.[123]

The degree to which American compensation statutes fail of uniformity, or of uniform adequacy, in extent of field can not be stated at once accurately and briefly, if indeed it can be stated accurately at all; but some rough and provisional, or introductory, generalizations can be condensed within a few words. Save as federal authority reserves for its own possible regulation the great businesses of interstate and foreign transportation or commerce, the employments in mining, construction, manufacturing, transportation, and communication are included generally in all of the compensation states but New Hampshire, where no small amount of construction work is left out. Public employments are included more often than not, perhaps in two thirds of the states. The mercantile and professional employments and such personal employments as are in business are included in none of the listing states, nine in number,[124] and in all of the others, fourteen in number. Rarely, indeed, is agricultural labor included, or domestic service, or occupation of whatever kind which is not for the employer's business or profit. These are the composite and heavy lines along which the demarcations tend to run; and they by themselves would be easy to follow. But across them here and there, this way and that, cut the lighter lines of local or particular discrimination and separation, blurring them and one another, until the actual field boundaries are difficult to trace and more difficult to keep in mind clearly.

The numbers and percentages of the employed to be found in several great and small classes of employment can not be known now with anything like accuracy: some of their class designations are not found at all in the statistical returns of the states or the nation, and others, although found, have not there exactly the same meanings as in the compensation laws. But certain estimates may prove of some value, even though they be but provisional and very rough indeed, with not the least pretense of accuracy.

The occupation statistics of the thirteenth census of the United States show that in 1910 there were about 940,000 mining em-

[123] Chief Justice Winslow of the Wisconsin Supreme Court, Nov. 14, 1911, in case of *Borgnis* v. *Falk Co.*, 147 Wis. 327; 133 N. W. 209.

[124] Kentucky is not now to be counted, her act being invalid.

ployees in the United States as a whole, something less than 4 per cent of the 24,600,000 persons of ten years and more engaged in gainful pursuits who might be counted as employees.[125] Together with manufacturing employees in the narrower sense are combined not only those engaged in the preparation of foods and beverages, the meat-packers, the bakers, the brewery and distillery workers, and the rest, but all occupied in any of the mechanical trades or in construction work of any kind, in earth and rock, as well as with the ordinary run of building materials; and in the large class formed thus there were some 9,650,000 employees or about 39 per cent of the total. Transportation by rail, by water, and on the streets, and communication by telephone and telegraph show 2,500,000 or a little more than 10 per cent; clerical employees, unfortunately reported as a separate class, show 1,740,000 or 7 per cent; mercantile employments, from the banker to the undertaker, show 2,150,000 or 9 per cent; personal, professional, and miscellaneous show about 500,000 or 2 per cent. Agriculture, without including the laborers reported as on the home farms but including that broad range of landed industries which corresponds to the express or implied definitions of the compensation laws,[126] had about 3,500,000 employees or 14 per cent; domestic service of one sort and another had 2,200,000 or 9 per cent; public employments, teaching, and the rest, had 1,200,000 or less than 5 per cent. The last two, taken together with such other employments as are not for the employer's business or profit,[127] make this inclusive class 3,630,000 or 15 per cent of all employees. If the clerical employees of the census tables be distributed to the four great groups of industries or business to which, doubtless, most

[125] See note 76. The estimates of the text are based upon the occupation statistics of the census, but are the result of some transfers and some conjectures among the items of the tables. The principles and the methods of transfer and combination are such as would suggest themselves to anybody using the tables for the purposes of the text. Bartenders are transferred from the class of "domestic and personal" occupations to "trade." Fishermen and oystermen are removed from "agriculture, forestry, and animal industry." Least satisfactory have been the results of the attempt to eliminate the employers and the independent workers from the great class of manufacturing and mechanical industries.

[126] California declares that her law shall not apply to those "engaged in farm, dairy, agricultural, viticultural, or horticultural labor, in stock or poultry raising" (sec. 14). The New York list, as the lists of the other states, is without any reference to any of the landed industries.

[127] For the variety of such employments see page 246.

of them do really belong, and upon the arbitrary principle of proportionality among them one with another, then mining rises to 1,050,000 employees or something more than 4 per cent of the total; manufacturing, mechanical, and construction work rises to 10,950,000 or 43 per cent; transportation and communication, to 2,800,000 or 11 per cent; and mercantile employments, to 2,400,000 or 10 per cent of all employees. It will be understood that these percentages, roughly computed as they are, must be modified for state and state: they are for the entire country.

If now the figures which result from the absorption of clerical employees into the other four classes be taken as the basis of estimates, it will appear that, on the average, the states which enumerate employments to be covered by their compensation laws cover not far from 58 per cent of the employees within their jurisdictions: 43 per cent in manufacturing, mechanical, and construction work; 11 per cent in transportation and communication; and rather more than 4 per cent in mining. Where, in these same states, public employment is included, the percentage will rise to something like 63 per cent or only to 59 per cent or 60 per cent, according as all public employments are included or only those in the particular occupations which are enumerated for private employers and in which public employees will not often be found. In the states without lists, where all employments are to be covered except such as are excluded specifically, the addition of mercantile employments with their 10 per cent and the personal and professional employments with their 2 per cent will raise the proportion of the employees covered to about 70 per cent, if public employment be not included; if public employment be included here with no restrictions to particular occupations, the proportion rises to about 75 per cent. And there stands the common or normal maximum; although some of the states rise considerably above it.

These comparisons of the two groups of compensation states, showing merely the presumptive average of one group in contrast with the presumptive average of the other and revealing nothing as to the individual states, indicate a serious failure both of adequacy and of uniformity. The extent of the failure would be made strikingly manifest by an examination of the twenty-three states, one after another. But an examination limited to some few must suffice. In the degree of fullness with which it includes employments within its field of compensation the individual state will

depart from the presumptive average figures which have been given if the different classes of employees are found in her jurisdiction in other than average proportions or if the demarcation of her field is different from the normal or average. And, as a consequence of one and the other of these divergencies, much greater lack of adequacy and uniformity among the states is to be revealed than has been made to appear hitherto. Still greater is the lack, and of greater practical importance, which is shown in the actual elections of compensation under the optional laws. This study takes account only of the extent and method of legislative provisions.

New Jersey, doubtless, has the broadest field of compensation, the most adequate. For she includes all employments, public and private, for profit or for pleasure, excepting neither domestic servants nor farm laborers, and excluding only the casual laborer. It would be vain—for me, at least—to attempt to estimate the casual employees in New Jersey. They will be found chiefly among the longshoremen, dressmakers, nurses, laundresses not in laundries, scrubbers and cleaners, and certain classes of unskilled laborers. Perhaps they amount to some 2 per cent or 3 per cent of the total. If so, then New Jersey covers not far from 97 per cent or 98 per cent of the employees within the possible reach of her statute.[128] Connecticut, quite certainly, comes next in order; for her act extends to all except casual laborers and those employed in numbers less than five.[129] Probably the numerical exception cuts out less than 10 per cent of the regular employees; so that Connecticut stands with some 90 per cent of her employees under compensation.[130] Ohio and Wisconsin would be in nearly the same grade with Connecticut did not both limit their laws, in private employment, to those occupied for the employer's business

[128] It will be understood always that state laws cannot cover those engaged in interstate commerce. Were it practicable, the deduction of these from the principal numbers in the several states would not modify greatly the percentages given in the text: still less would it modify the differences between state and state. And these last are of chief significance here.

[129] For the avoidance of intolerable complexity of statement, outworkers are disregarded now. And in like manner one or another of the minor classes will be ignored in other states.

[130] Of the 210,792 manufacturing wage-earners in 1909, only 4390, or 2.1 per cent were in establishments of less than six; and in Connecticut manufacturing employees are more than all the others. On the other hand, the major part of the 16,099 farm employees are either casual or in groups less than five.

or profit, thus excluding some 8 per cent or 9 per cent more[131] and reducing their figures nearly or quite down to 80 per cent.

Next come the group of ten states which include employments generally, without enumeration, but expressly except agriculture and domestic service. As California, Iowa, Massachusetts, Michigan, Minnesota, Nebraska, and Nevada, seven in all, include public employment, the mere exception of farm and household labor and the common exception of casual labor bring the presumptive general average of these states down to about 75 per cent; although the varying proportions in which the excepted classes are found in the several states combine with particular provisions of the statutes to cause wide divergencies from that figure. California does not except casual labor, unless it is outside of the employer's business; and the presumption that, therefore, her figure should be near 80 per cent is strengthened by an examination of her occupation statistics. On the other hand, Nebraska is an agricultural state with no great amount of manufacturing; and she excepts not only casual laborers but in addition both those not occupied in the employer's business and all employed in numbers less than five. Her number is probably well below 50 per cent. Where, as in Iowa, landed industries are predominant and the specific exceptions run beyond the usual ones to all clerical employees not exposed to hazards, the percentage is by so much the more reduced. Rhode Island, Texas, and West Virginia, which except farm and domestic labor and do not include public employments, should stand presumptively at some 70 per cent. But Rhode Island does not except casual labor as such; and the very high development of manufacturing industry within her boundaries and the slight importance of her agriculture may raise her above 80 per cent. Texas has very great agricultural interests and but little manufacturing or mechanical industry; she excludes all casual laborers, all employed otherwise than in business, all employed in numbers less than six, and all engaged in common carriage by rail; and this combination of conditions reduces her figure not only far below the presumptive general average of her group but also, as is probable, to the lowest to be found in any of the states, perhaps to 40 per cent, possibly even lower.

In all of the nine states with lists of occupations to be covered there fall away further the mercantile, professional, and personal

[131] Chiefly domestic employees, who appear to be not far from 8 per cent of all employees in these two states.

employments, and with these their proportionate parts of the clerical employments, in all some 12 per cent as a presumptive average; so that these states should show not more than about 58 per cent of their employees under their compensation laws. Where the law is limited to manual or mechanical laborers, as generally in Arizona and New Hampshire, there is a reduction of undetermined but considerable extent. Even larger must be the reduction where, as variously here and there in the nine states, inclusion depends upon proximity to or the use of dangerous agencies or upon particular situations or environments. In the absence of any statistical data for the particular classes designated so variously in the lists, it is quite out of the question to estimate the magnitudes of these reductions from any returns now available. Nor is it of any large importance to do so here. This presumptive general average of 58 per cent will be modified further in different states by the inclusion or exclusion of public employees, casual labor, outworkers, by the presence or absence of numerical minimum exemptions, by limiting or not limiting to employment for the employer's business ends, as well as by the ever varying proportions of domestic, agricultural, mercantile, and other forms of labor.

A somewhat careful attempt to trace the designations of the New York list through the occupation statistics of the federal census and through the state's own industrial directory of 1912 indicates that, notwithstanding all of her large and small exclusions and omissions, purposed or unintended, New York still has some 62 per cent of all her employees under the compensation law. This high figure is due to the great development of the state's manufacturing and mechanical industries, which without any absorption of clerical employees, show about 46 per cent of all employees as against some 39 per cent for the entire country. On the other hand, low industrial development and the predominance of agriculture reduce very markedly the figures for some of the listing states. In Louisiana more than half of the persons in gainful pursuits are in agriculture and the related industries, and in Texas much more than half; whereas the manufacturing and mechanical trades are but little developed in these states. In Iowa, Kansas, and Nebraska the situations are not far different.[132]

[132] The percentages in agriculture and related industries and in the manufacturing and mechanical for these states are as follows: Louisiana, 51.3 and 17.3; Texas, 60.0 and 11.8; Iowa, 42.9 and 19.1; Kansas, 44.1 and 18.5; Nebraska,

The state with the smallest part of her employees protected by the compensation law is not, as might have been anticipated, New Hampshire. For, although New Hampshire openly disregards the greater part of construction work, her high development in the manufacturing trades, which are covered, keeps her from being lowest in the list. The lowest state may be Texas, Louisiana, or Kansas. Texas does not cover agriculture, domestic service, public or casual employment, common carriage by rail, or any occupation not in the way of the employer's business; she is the least advanced of the three states in those industries which make the larger part of their fields of compensation; and she excludes from the benefits of her statute workers employed together in numbers less than six. However, she does not restrict her law to enumerated employments, as do Louisiana and Kansas, but includes mercantile, professional, and personal occupations, as well as manufacturing, construction, mining, and the others. Louisiana restricts her law to enumerated employments, chiefly within the more narrowly industrial field, and so does not cover agriculture, domestic service, or the mercantile, personal, or professional occupations, or any employment otherwise than in the employer's business, but she is more advanced industrially than Texas; she does not exclude casual laborers or any minimum numerical group, and she does include public employees of all sorts, except officials. Kansas has a larger part of her employees in the industrial occupations which are indicated in her list; but she does not include all public employment and, except in mines, she excludes all employed together in numbers less than five. It is probable that none of these three states has very far from 40 per cent of its employees under compensation law. But data are not to be had for a definite conclusion.

The small exclusions and omissions of particular employments, chiefly in some specialized form of construction, manufacturing, or transportation, which have been mentioned as probably due to differences of open or concealed purpose or to lack of care and skill in legislative draftsmen, do not figure for much in the percentages of all employees. When the law fails to cover transportation otherwise than by railway, a few per cent of all employees may be affected; and the omission of a good part of construction work in

45.9 and 17.0. In contrast: Massachusetts, 4.9 and 50.6; Rhode Island, 5.0 and 56.3; Connecticut, 9.7 and 52.8; New York, 9.5 and 39.8; New Jersey, 7.5 and 45.8.

New Hampshire affects a few or several per cent there. But the 2539 distillery workers so strangely overlooked in Kentucky are not more than half of one per cent of all the employees in that state. The employees among the 2459 oystermen and fishermen omitted in New York are not one tenth of one per cent of New York's employed; still less is the figure of the 813 who worked in 1910 on flags, banners, and regalia, the 496 starch-makers, or the 464 who were making surgical appliances and artificial limbs. And all of those in a score or more of callings who stand to lose their protection through the unfortunate framing of the New York statute can not amount to more than one or two per cent of all who are employed within the state. In 1910 there were but 355 in Maryland in the occupation uncovered by that state's dropping of artificial ice from her list. There were but 42 of all ranks engaged in water transportation in Kansas, and only 7 in Nevada, employers and employed together. All this does not mean that the omission of the distillers, oystermen, starch-makers, and the rest is of trifling consequence. It means much to the workers in the omitted trades and to their families. And in the aggregate they number a great many. One or two per cent of New York's employed will be from 30,000 to 60,000, far too many to be neglected in any social policy.

Moreover, numbers of vexatious questions arise whenever the field of compensation is marked off by particular descriptive terms. Such questions must arise whenever the field is limited in any degree or in any manner. Should only casual, or domestic, or agricultural employment be excepted, questions would arise, as indeed they have arisen, over interpretations or discriminations. Some effort and difficulty there may be in locating an event within its year or within its country of occurrence, if it occurs near the beginning or the end of a year or very close to the frontier. But, if it is required only to determine the year and the country of occurrences, for the great part of them there will be no uncertainty and no difficulty whatever in the determination. But, when it is necessary to ascertain the day and the county within which everything happens, difficulties multiply; and they would multiply much more if the points or lines of distinction between day and day and county and county were not clear and definite but more or less indeterminate. And so questions of jurisdiction or control develop in great numbers when the field of compensation is not the whole field of industrial accident but a lesser area enclosed within

its own narrower bounds and then divided and subdivided into smaller and smaller plots within some one of which an accident must be located with certainty before the resultant injury may be compensated. Some few of these questions have been suggested already in the course of this study; but they rise by the score. And to answer them one way or the other serves not in the least to establish a distinction of any importance in itself or to deal substantial justice to one or to another: it serves merely to conform in a more or less arbitrary and artificial way to a more or less arbitrary and artificial distinction of a statute.

That the field of compensation in the United States fails both of adequacy and of uniformity is not to be denied. The field is not adequate as long as it is less broad than the field of industrial accident: all employments and occupations should be included. Within the broad field of compensation there may be wise and just restrictions of scope, according as the causes or results of accidents may not warrant or allow compensations. But the field should be without limits. Even the very rough estimates of this study show, in a substantially reliable way, the lack of uniformity of field. The estimates are least unreliable, state by state, in New Jersey, Connecticut, Wisconsin, and Ohio, where the problems of estimation are simplest; and one goes not far wrong in holding that these states cover by their statutes from 80 per cent to 95 per cent or more of their employed. At the other end of the series there are greater probabilities of error in hasty and rough estimates; but one is not far from the truth in saying that in Kansas, Louisiana, and Texas from 35 per cent to 45 per cent of all employees are under the compensation laws. Somewhere between these upper and lower figures stand sixteen other states. The estimates of this study would indicate that the sixteen are distributed all along the way between and with no appreciable grouping. Even if, as well may be, better data or a wiser use of present data should show that the position of each several state must be changed by 10 per cent, or more, there is not the least reason to anticipate that the better estimates—better for most purposes—would bring the states in any degree toward a uniformity in field of compensation. They might be shifted about at points between 40 per cent and 90 per cent; but the wide diversities in extent of field would remain.

WILLARD C. FISHER.

Middletown, Connecticut.